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CODE OF PRACTICE^{of}

OF

LOUISIANA,

WITH

ANNOTATIONS OF HENRY L. GARLAND, JR., ESQ.,

AND AN

APPENDIX,

GIVING ALL THE AMENDMENTS TO ARTICLES OF THE
CODE TO AND INCLUDING

THE SESSION OF 1900,

AND ALL SUCH OTHER ACTS OF THE LEGISLATURE
AS RELATE TO

PRACTICE AND PROCEDURE,

AND CONTINUING THE ANNOTATIONS OF MR. GARLAND
FROM THE

FORTY-FIFTH ANNUAL REPORTS

TO AND INCLUDING THE

FIFTY-SECOND ANNUAL REPORTS

TOGETHER WITH A NEW AND COMPREHENSIVE INDEX.

COMPILED AND EDITED BY

SOLOMON WOLFF,

OF THE NEW ORLEANS BAR.

F. F. HANSELL & BRO., Ltd.
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DEDICATION.

This book is Affectionately Dedicated to My Devoted Father,

HENRY L. GARLAND,

OF THE OPELOUSAS BAR,

In token of appreciation of his worth as a lawyer, citizen and

man, and of the love and affection of his son,

HENRY L. GARLAND, JR.

PREFACE TO SECOND EDITION.

This edition of the Code of Practice contains all the matter as given in the original edition of the Code by Henry L. Garland, Jr., Esq. In addition, the Appendix contains, in full, all the amendments to Articles of the Code adopted by the Legislature up to and inclusive of the session of 1900. I have endeavored to print in the Appendix other acts than those amending in terms Articles of the Code of Practice, but which relate to Practice and Procedure generally. All acts of that nature have probably not been printed, because many of them, while intended to amend or establish substantive laws, do yet, incidentally, as it were, prescribe the procedure to be used for the special purpose. To embody all acts therefore at all prescribing procedure and practice, would have carried the book far beyond its scope.

As to the Index. The greatest effort has been made to make it complete, and yet it may happen that the searcher for any particular article will look for it under a heading different from that fixed by the compiler. The first approaches it from the standpoint of the particular point he is interested in, the other from the broader view of a general classification. Nevertheless, it is hoped that with the liberal cross referencing, the searcher will, with the exercise of some patience, be able to find what he is looking for. Wherever possible, I give both the number of the article and the page. In a few instances this could not be done, because the index refers to an act of the legislature other than an article of the Code, or it refers to annotation.

The annotations speak for themselves. I have endeavored in each note to give a summary of the case, without any expression of opinion as to what I thought the court decided.

Amendments and annotations contained in the Appendix are always given under a number and side line corresponding to that in the body of the book.

SOLOMON WOLFF.

New Orleans, January, 1901.



TABLE OF CONTENTS.

(REFERENCES ARE TO PAGES).

PART I.

OF CIVIL ACTIONS.

	PAGE.
TITLE I.—OF ACTIONS IN GENERAL.....	1
Chapter 1.—Of the general division of actions.....	1
Chapter 2.—Of the rules applicable to all civil actions.....	5
Chapter 3.—Of the rules peculiar to the different kinds of civil actions	19
Section 1.—Of the several kinds of personal actions and of the rules which govern them.....	19
Section 2.—Of the real action, its subdivisions, and the rules peculiar to it.....	22
§ 1.—Of the petitory action.....	23
§ 2.—Of the possessory action, and of the rules which govern it.....	27
§ 3.—Of the hypothecary action, and of its rules.....	33
Chapter 4.—When actions are to be brought and in what manner.....	43
Section 1.—Of judges; their jurisdiction; how their competency is regulated.....	43
Section 2.—Of the mode of bringing civil suits; of suits and of parties litigant.....	49
Chapter 5.—What persons are entitled to bring action.....	51
Chapter 6.—Against whom actions may be brought.....	68

PART II.

<i>Containing Rules to be observed in the Prosecution of Civil Actions....</i>	81
TITLE I.—PROCEEDINGS TO BE OBSERVED IN THE PROSECUTION OF ACTIONS BEFORE COURTS OF ORIGINAL JURISDICTION.....	81
Chapter 1.—Of courts of original jurisdiction and their powers.....	81
Chapter 2.—Of the ordinary proceedings.....	93
Section 1.—Of demand, and of cumulative actions.....	94
Section 2.—Before what tribunals actions are to be brought.....	100
Section 3.—Of petition and citation.....	102

	PAGE.
Section 4.—Of the conservatory acts which may accompany the demand	128
§ 1.—Of the arrest of the debtor	129
§ 2.—Of attachment in the hands of third persons	140
§ 3.—Of sequestration	183
§ 4.—Of provisional seizure	189
§ 5.—Of injunction	210
Section 5.—Of judgment by default	238
Section 6.—Of the appearance and answer of the defendant	245
Section 7.—Of exceptions and defence	257
§ 1.—Of dilatory exceptions	258
§ 2.—Of declinatory exceptions	261
§ 3.—Of the recusation of judges	263
§ 4.—Of peremptory exceptions	270
Section 8.—Of interrogatories on facts and articles	273
Section 9.—Of issue joined (<i>contestatio litis</i>)	281
Chapter 3.—Of the incidental demands which may be made pending the action	283
Section 1.—Of demands in compensation or set-off	284
Section 2.—Of demands in reconvention	288
Section 3.—Of demands in warranty	293
Section 4.—Of intervention or interpleading	296
Section 5.—Of the opposition of third persons	305
Chapter 4.—Of the proceedings after issue joined, until judgment be given	313
Section 1.—Of real tender	313
Section 2.—Of the amendment which may be made to the petition or to the answer; of the consolidation of causes, and of commissions for examining witnesses	319
Section 3.—Of experts, auditors of accounts, judicial arbitrators	333
Section 4.—Of setting causes for trial, of continuance, and of the proceedings preparatory to trial and judgment	342
Chapter 4.—Of trial and judgment	349
Section 1.—Of the trial and discontinuance of the suit	349
Section 2.—Of the trial before a jury	359
Section 3.—Of judgments and costs	378
Chapter 5.—Of the mode in which definitive judgments may be revised, modified, or reversed	401
Section 1.—Of new trials	401
Section 2.—Of the appeal and statement of facts	406
Section 3.—Of the nullity of judgments	472
Section 4.—Of the rescission of judgments	486
Chapter 6.—Of the proceedings in execution of judgments	487
Section 1.—General provisions	487

TABLE OF CONTENTS.

ix

	PAGE.
Section 2.—Of the execution of judgments which require something to be given or something to be done	496
Section 3.—Of the execution of judgments directing the payment of a sum of money	500
§ 1.—Of the writ of <i>ieri factas</i>	500
§ 2.—Of the sale and adjudication of property seized under the writ of <i>ieri factas</i>	529
§ 3.—Of the consequence of the adjudication, and of the payment of the price	552
Section 4.—Of imprisonment on judgment	560
Chapter 7.—Of executory process	562
Chapter 8.—Of summary process	584
Chapter 9.—Of the various officers of courts of original jurisdiction	592
Section 1.—Of the duties and powers of sheriffs in civil matters	594
Section 2.—Of the duties and powers of clerks	602
Section 3.—Of translators, criers and constables	611
Chapter 10.—Of orders which courts of justice may render in certain cases	611
Section 1.—Of the writ of <i>habeas corpus</i>	612
Section 2.—Of other orders which courts of justice may render	622
§ 1.—Of the order directing the performance of some specific act (writ of <i>mandamus</i>)	624
§ 2.—Of the order forbidding further proceedings in a suit (writ of prohibition)	643
§ 3.—Of the mandate having for its object to ascertain the validity of a judicial proceeding (writ of <i>certiorari</i>)	652
§ 4.—Of the mandate to prevent an usurpation of office (writ of <i>quo warranto</i>)	657
TITLE II.—OF PROCEEDINGS IN THE SUPREME COURT OF THE STATE	659
TITLE III.—OF THE PROCEEDINGS IN COURTS OF PROBATE	722
Chapter 1.—Of Courts of Probate and their jurisdiction	722
Chapter 2.—Of the mode of proceeding in Courts of Probate	726
Section 1.—Of the mode of proceeding in certain actions	726
§ 1.—Of the opening and proving of wills	726
§ 2.—Of the appointment of tutors and curators of minors, interdicted and absent persons	731
§ 3.—Of the appointment of curators to vacant successions and to absent heirs	739
§ 4.—Of the benefit of inventory	742
§ 5.—Of the settlement of successions	746
§ 6.—Of accounts to be rendered by administrators of estates and other persons	755

	PAGE.
§ 7.—Of the removal of tutors, curators, and testamentary executors	760
§ 8.—Of the partition of estates	763
Section 2.—Of the proceedings in relation to all actions brought in the Parish Courts as Courts of Probate	767
TITLE IV.—OF PROCEEDINGS BEFORE JUSTICES OF THE PEACE...	775
Chapter 1.—Of the jurisdiction of justices of the peace in civil matters	775
Chapter 2.—Of the mode of trial before justices of the peace	779
Chapter 3.—Of orders which justices of the peace may make in suits commenced before them	785
Chapter 4.—Of appeals from judgments rendered by justices of the peace	794
Chapter 5.—Of the execution of judgments rendered by justices of the peace	798
Chapter 6.—Of the powers granted to justices of the peace for the performance of their duties	802
Chapter 7.—Of constables and their duties	804

CODE OF PRACTICE.

PART I.—OF CIVIL ACTIONS.

TITLE I.

OF ACTIONS IN GENERAL.

1. What are Actions—An action is the right given to every person, to claim judicially what is due or belongs to him.

Action means also the exercise of that right, that is to say, a judicial demand founded on a contract, or given by law, by which the plaintiff prays that the person against whom he proceeds, be ordered to do that which he has bound himself towards him to perform.

Non-judicial proceedings to collect taxes are not suits.

Carre vs. City, 41 A. 996.

CHAPTER I.

OF THE GENERAL DIVISION OF ACTIONS.

2. Division of Actions—Actions are divided into several kinds:

The first division of actions is into personal, real, and mixed.

C. P. 96.

(A) Character of action determined by essential facts and allegations, not by mere styling.

Walling Heirs vs. Howell, 34 A. 1105; Ferrand vs. Heirs of Bree, 35 A. 308; Morris vs. Cain, 35 A. 739.

(B) Actions which are sui generis:

1. Against succession to recover movable property, or fund, susceptible of identification.

Bouchard vs. Parker, 32 A. 535.

2. Trial of opposition to application made to Governor for cancellation of official bonds.

State ex rel. Isaacson vs. Judge 34 A. 74.

3. Action to enjoin squatters on State or public land.

Morgan vs. Nagodish, 40 A. 248.

4. Between partners for a settlement.

Redovich vs. Frigerio, 27 A. 68.

5. Bill of interpleader, where holder of fund does not know to whom to pay. Call of privilege or mortgage creditors in intervention at request of adjudicatee.

Morris vs. Cain, 35 A. 739; Fortier vs. Slidell, 7 R. 336; Trustees vs. Dupuy, 31 A. 305; Clark vs. Saloy, 2 A. 367; Lizardi vs. Gossett, 1 A. 135.

3. Personal Actions—A personal action is that by which a person proceeds against one who is personally bound towards him, either by a contract or by virtue of the law, in order to compel him to pay what he owes to him, or to perform what he has promised.

This action is called personal, because it is attached to the person bound, and follows him everywhere.

C. P. 26, 27.

1. Action lies by father for damages for death of minor.

Frank vs. Railroad Co., 20 A. 25.

2. Action lies, in favor of minor children, or widow of deceased, and in default of these in favor of surviving father or mother for one year, for damages for death of deceased.

Act 71 of 1884, p. 94.

Husband not within this statute.

Walton vs. Booth, 34 A. 912.

OF THE GENERAL DIVISION OF ACTIONS.

3. Prior to Act 71 of 1884 no action for damages for life of *de cuius*.

Vredenberg vs. Behan, 38 A. 627; Hubgh vs. R. R., 6 A. 496.

Nor even under Act of 1884 can *punitive* damages be recovered.

Hamilton vs. R. R., 42 A. 629.

4. Prior to Act of 1884 suit must be for damages done to child—not father.

Earhardt vs. Railroad Co., 17 A. 244.

4. **Real Actions**—A real action is that which relates to claims made on immovable property, or to the immovable rights to which they are subjected.

The object of this action is the ownership or the possession of such property; and they are, therefore, subdivided into petitory and possessory actions.

C. P. 41, 61.

5. **Petitory Action**—The petitory action is that by which he who has the property of a real estate, or of a right upon or growing out of it, proceeds against the person having the possession, in order to obtain the possession of the immovable property, or the enjoyment of the rights upon it, to which he is entitled.

C. P. 48, 46, 57; 40 A. 307.

6. **Possessory Action**—A possessory action is that by which one claims to be maintained in the possession of an immovable property, or of a right upon, or growing out of it, when he has been disturbed; or to be reinstated to that possession, when he has been divested or evicted.

C. C. 3455, 3456; C. P. 46.

7. **Mixed Action**—A mixed action is one which in its nature partakes both of the real and of the personal action, such as a claim for the ownership of real property, and also for the fruits it has produced, or their value.

8. **Civil and Criminal Actions**—The second general division of actions, classes them into civil and criminal actions.

9. Civil Action—A civil action is one which is brought for private interest, such as a suit to obtain the payment of a sum due, the restitution of property, or reparation for an injury done by words or action.

1. Suit for fine is a civil action.

State and Town of Plaquemine vs. Buff, 80 A. 497.

2. So is charge of fraud against insolvent.

Mayewski vs. Creditors, 40 A. 94.

10. Criminal Action—A criminal action is one which is instituted in the name of the State, by its proper officers, in order to obtain the public reparation of any crime or misdemeanor; this action comes under the head of penal jurisprudence.

1. Forfeiture of appearance bond may be entered in criminal action.

State vs. Williams, 87 A. 200; State vs. Burns, 88 A. 868; R. S. § 1082.

2. But *aliter* in appearance bond taken before recorder.

La. Society Prevention of Cruelty to Children vs. Cage, 45 A.

11. Division of Actions as to Object—Actions, with respect to their object, are divided into two classes; those by which movables, and those by which immovables are claimed.

12. Incorporeal Rights—Although incorporeal rights be not in reality movables nor immovables, they are nevertheless placed by law in one of those two classes.

Actions tending to recover an immovable, or a real right, or a universality of things, such as an inheritance, are considered as real; while actions for the recovery of a movable or of a sum of money, though accompanied with a mortgage, are not real actions.

C. C. 474, 2010; C. P. 41, 43, 61; see *Wisdom vs. Buckner*, 81 A. 60; *Boisse vs. Dickson*, 81 A. 748.

CHAPTER II.

OF THE RULES APPLICABLE TO ALL CIVIL ACTIONS.

13. Lex Fori and Lex Loci—The forms, the effects, and the prescription of actions, are governed by the law of the place where they are brought: but contracts are governed by the law of the place where they were entered into.

C. C. 8532; R. S. 2806; C. C. 10; Suc. of Lorenz, 41 A. 1098.

(A) *Forms*:

1. Parties may waive forms when not prohibited.

Quetier vs. Suc. of Hille, 18 A. 65; Ross vs. Fritchard, 15 A. 531; Tun-
nard vs. Hill, 10 A. 247; St. Romain vs. Robeson, 12 R. 194; 18 A. 189;
41 A. 899.

2. Prescribed form not exclusive of other appropriate remedy.

Trustees vs. Dupuy, 31 A. 305; Lizardi vs. Gossett, 1 A. 138; Clark vs.
Saloy, 2 A. 987; Fortier vs. Sildell, 7 R. 398.

(B) *Prescription*:

O. P. says *lex fori* governs *prescription*, but see Civil Code,
Article 3532, where rule is stated as to non-residents com-
ing into this State subsequent to release under prescription
of former residence.

(C) *Lex fori determines*:

1. Admissibility of evidence and competence of witnesses.

12 A. 410; 41 A. 1098.

2. Privileges on property.

Owens vs. Davis, 15 A. 22; Gauze vs. Bullard, 16 A. 107; Brent vs.
Shouse, 16 A. 158; Hadden vs. Joor, 7 A. 272; Newman vs. Cannon, 48
A. 718; Hyman, Liechtenstein & Co. vs. Schlenker, 44 A. 108.

3. Prescription.

Norton vs. Sterling, 15 A. 899.

4. Effect of cession of property.

Brent & Co. vs. Shouse, 15 A. 110.

5. Forms of remedies.

Willard vs. Wood, 185 U. S. 812.

14 OF THE RULES APPLICABLE TO ALL CIVIL ACTIONS.

14. Prematurity of Actions—Every obligation gives impliedly a right of action to enforce its execution; but the obligation and the right of action do not always arise at the same time. Thus in contracts to be performed at a future period, the obligation which grows out of the contract, arises at the very moment of making it, but the right of action growing out of it, arises only when the stipulated term has arrived.

New Orleans vs. Ferrier, 19 A. 184; *R. S.* 2806; *C. C.* 2062; *C. P.* 158.

(A) *Action Premature*:

1. Before tender is made, when required.

48 A. 507.

Thus tender of price paid necessary in suit to annul tax title.

Blanton vs. Ludeling, 80 A. 1232; *Barrow vs. Lapene*, 80 A. 810.

2. But no tender necessary.

- (a) Where tax was prescribed and prescription pleaded.

Breaux vs. Negrotto, 48 A. 431.

- (b) Where no tax was due at any time, or has been paid.

Lefebvre vs. Negrotto, 44 A. 791; *Davenport vs. Knox*, 84 A. 407;
Guldry vs. Broussard, 82 A. 520, 925; 24 A. 524; 5 A. 675.

- (c) Where amount is too uncertain to be calculated.

Miller vs. Montague, 82 A. 1290; *Stafford vs. Twitchell*, 88 A. 520.

3. In tax suits amount may be tendered at any time prior to judgment or be adjusted in the judgment.

Breaux vs. Negrotto, 48 A. 431; see also *Prescott vs. Payne*, 44 A. 657.

4. And it seems a man may have to wait until he dies before his right of action arises, as in a suit to secure right of sepulture.

State ex rel. Soares vs. Hebrew Congregation, 81 A. 205.

5. Action of nullity of judgment pending suspensive appeal.

Morris. vs. Bienvenue, 80 A. 878.

6. Injunction of seizure by lessee before attempt to evict.

Carroll vs. Chaffe, 85 A. 88.

7. Suit for hypothetical damages not yet sustained.

Dwyer vs. Woolfe, 40 A. 46.

8. Application for prohibition before plea to jurisdiction.

Levet vs. Lapeyrollerie, 88 A. 912.

9. Suit for alimony, pending a judgment for divorce.

Holbrook vs. Holbrook, 82 A. 18.

10. Minor's claim against tutor before liquidation.

Suc. of Edwards, 82 A. 457.

11. Suit by creditor to annul sale before expiration of term of credit.

Yager Milling Co. vs. Lawler, 89 A. 572.

12. Suit before maturity of debt.

24 A. 50; 28 A. 577; 22 A. 248.

Or against endorser prior to presentment, failure of maker to pay and due notice.

Clafin Co. vs. Feibleman, 44 A. 519.

13. Premature suit dismissed on exception, though obligation subsequently matures.

State ex rel. Merz vs. Judge, 81 A. 120; 41 A. 227; 44 A. 522; but see 34 A. 841.

(a) No tender required from minor suing tutor for account.

Rist vs. Hartner, 44 A. 379; *Rist vs. Hartner*, 44 A. 480; *Heirs of Burney vs. Ludeling*, 41 A. 682; *Wood vs. Nicholls*, 88 A. 744; *Tutorship of Hackett*, 4 R. 290.

(b) Where defendant has already refused.

Ware vs. Berlin, 48 A. 534.

14. Injunction by tax-payers to prevent vote on question of tax is premature.

Roudanez vs. Mayor, 29 A. 271; C. P. 686.

(B) *Not Premature:*

Executory process when one instalment is due.

Penouilh vs. Abraham, 42 A. 188; C. P. 686.

15. Interest in Actions or Pleas—An action can only be brought by one having a real and actual interest, which he pursues, but as soon as that interest arises he may bring his action.

15 OF THE RULES APPLICABLE TO ALL CIVIL ACTIONS.

(A) *No Interest is Shown:*

1. By *Debtor*, attacking assignment of debt, his right to plead equities existing against assignor being maintained.

Bonner & Bonner vs. Beard, 48 A. 1086; Long vs. Klein, 85 A. 894; Montgomery vs. Koester, 85 A. 1062; Pipes vs. Norsworthy, 25 A. 557; Bayou Sara vs. Harper, 15 A. 233.

2. By *Public Administrator*, suing to remove executors or administrators.

Succession of Burnside, 84 A. 928; Succession of Elgee, 26 A. 553, 162; Succession of Saloy, 44 A. 433.

3. By *Sheriff*.

- (a) Urging defences of co-defendant.

Chaffe & Sons vs. Elliott, 87 A. 194; 28 A. 590; 25 A. 414.

- (b) Championing rights of prior attaching creditors, who are parties.

Chase vs. Bell, 82 A. 460; Lynch vs. Leckie, 9 A. 506

- (c) Taking any action whatever *after return of writ*.

Succession of Caldwell, 15 A. 617.

- (d) By *Ex-Sheriff* holding over, in appealing from judgment between other contending claimants to the office.

Gilbeau vs. Detleige, 82 A. 909.

- (e) Sheriff mere nominal party in injunction can not set up defences proper to main defendant only.

Chaffe & Sons vs. Elliott, 87 A. 194.

4. By *Father*, suing on judgment in favor of his minor children subsequently become majors.

Ashby vs. Ashby, 88 A. 105.

5. By *Corporation*, appealing from judgment against stockholder party to suit.

Board of Liquidators vs. Waterworks, 89 A. 202.

6. By *Receiver and Liquidators* championing right of individual stockholder.

Raymond vs. Palmer, 85 A. 278; Lacombe vs. Milliken, 85 A. 867; Knoop, Hanneman & Co. vs. Blaffer, 89 A. 29.

7. By *Agent* individually for sums paid by principal.

Corral & Co. vs. Towboat Company, 87 A. 808.

By Creditor :

- (a) In opposing tableau in perfectly solvent succession, though an amount sufficient to pay him has been retained.

Succession of Gohs, 87 A. 428.

But where funds are not sufficient, he may attack judgment in favor of other creditors.

Cavaroc vs. Fournet, 28 A. 587.

- (b) In attacking debtor's renunciation of usufruct not subject to payment of debts.

Succession of Coyle, 52 A. 79.

- (c) Creditor of husband only, attacking validity of claim of intervening creditors of wife.

Miller vs. Handy, 83 A. 162.

- (d) Creditor of heirs or executor, not of succession, to remove the executor.

Carroll, Hoy & Co. vs. Hule, 21 A. 561.

- (e) Creditor holding mortgage, to contest validity of sale of property which passes *cum onere*.

Labauve vs. Woolfolk, 26 A. 440; Levi vs. Morgan, 83 A. 532.

- (f) Contending that attachment of other creditor is dissolved by assignment in bankruptcy.

Golson & Co. vs. Powell, 82 A. 521.

- (g) Creditor merely claiming to be placed on tableau can not attack judgment of homologation.

Succession of Woods, 86 A. 757.

9. By *Administrator*, applying for sale of effects of succession for purposes of partition among heirs.

Hebert vs. Hebert, 22 A. 809; Nesom vs. Weiss, 84 A. 1007.

10. By *Office Claimant*, who has no title himself, even if taxpayer.

State ex. rel. Ford vs. Miltenberger, 83 A. 267; Voisin vs. Leche, 28 A. 25; State vs. Mason, 14 A. 506.

11. By *Policy Holder*, suing without authorization for loss payable to special mortgagee.

Lane vs. Ins. Co., 85 A. 224.

12. By *Plaintiff in Petitory Action*, who has sold his interest.

Barron vs. Jacobs, 88 A. 870.

15 OF THE RULES APPLICABLE TO ALL CIVIL ACTIONS.

13. By *Plaintiff in Injunction*, not owner or otherwise interested in property seized.

Lewis vs. Savings Institution, 33 A. 1463; 3. A. 593.

14. By *Insolvent*:

- (a) Suing to recover property under allegation of nullity of syndic's sale.

Steib vs. Kaiser, 23 An. 337.

- (b) Attempting to control administration of assets.

Mudge vs. Commissioners, 10 R. 460.

15. By *Third Opponent*, whose title to property has been annulled, to contest judgment between plaintiff and defendant.

Wright vs. Steed, 10 A. 233.

- (a) Nor to contest distribution of fund in which he has no interest.

Tiner vs. Steamer, 5 A. 736; Coleman vs. Coleman, 37 A. 566.

- (b) *Aliter* where substantial right exists.

15 A. 433.

- (c) Third opponent claiming to be owner can not assail regularity of proceeding without enjoining.

Bomagosa vs. Del Nodal, 12 A. 341; Gilkeson-Sloss Co. vs. Bond & Williams, 44 A.

16. By *Under Tutor*, enjoining foreclosure of mortgage granted by surviving widow on her half of community.

French vs. Thompson, 24 A. 235.

17. By *Clerk of Court*, mandamus administrator of finance to bring suit before his court.

State ex rel. Byerly vs. Walton, 24 A. 115.

18. By *Lessee*, to arrest sale and annul order for executory process.

Carroll vs. Chaffe, 35 A. 33.

19. By *Riparian Owner*, to contest propriety, location and mode of building levees.

Bass vs. State, 34 A. 494.

20. By *Surety*, in resisting rule against him by syndic of attached defendants to cancel attachment bond.

Chaffe & Sons vs. Lisso & Scheen, 33 A. 206.

- Nor complaining about irregularities of proceeding not affecting him.

Hennen vs. Wood, 16 A. 263.

21. By *Pledgee of Note*, to urge want of consideration in answer to garnishment by creditor of pledgor.
Kirkpatrick & Co. vs. Oldham, 38 A. 552.
 22. By *Debtor*, complaining of partial assignment of claims of which he has no notice.
Belden vs. Slaughter House Co., 38 A. 591.
 23. By *Heir*:
 - (a) In objecting to sale of property of insolvent estate to pay debts.
Bennedict vs. Bonnot, 39 A. 972.
 - (b) In suing for damages to estate when estate is under administration.
Sloan vs. Stevenson, 24 A. 230.
 24. By *Discharged Bankrupt*, to stand in judgment.
Kennedy vs. Rust, 25 A. 556.
 25. By *one not owner of trade mark*, in suing for damages for its unauthorized use.
Laerolx vs. Nodal & Co., 41 A. 1018.
 26. By *executor of wife*, who can not sue for whole amount of notes belonging equally to her succession and her husband's, whose heirs are in possession.
Zimmerman vs. Langles, 36 A. 65.
 27. By *married woman*, to recover on contract made solely by her husband.
Niboul vs. Desforages, Montagnet & Co., 35 A. 565.
 28. By *State*, to recover fees of office.
George vs. Tucker, 27 A. 67.
 29. By *Intervenor*:
 - (a) In urging irregularities in the suit, such as insufficiency of bond and affidavit in sequestration.
Carroll vs. Bridewell, 27 A. 240; Fleming & Baldwin vs. Shields, 21 A. 118.
 - (b) When State intervenes in suit against auditor to compel him to do an unauthorized act.
State ex rel. Salomon & Simpson vs. Auditor, 28 A. 402.
 30. By *Receiver or Provisional Syndic* in resisting motion to vacate his appointment.
Mauberrret vs. Judge, 45 A. 241.
- (B) *Sufficient interest is shown*:
1. By *Board of Liquidation* in pleading prescription.
State ex rel. Eubera vs. Board, 35 A. 953.

15 OF THE RULES APPLICABLE TO ALL CIVIL ACTIONS.

2. By heir:

- (a) To compel holder of confiscated property to pay taxes.
Pike vs. Wassell, 94 U. S. 712.
- (b) To enjoin sale of succession property.
Vance vs. Cawthorn, 52 A. 124; *Bienvenu vs. Parker*, 80 A. 160.
- (c) To attack legacy made to concubine.
Carmena vs. Blaney, 16 A. 245; *Lazare vs. Jacques*, 15 A. 599.
- (d) To sue for partition by sale.
Bayhi vs. Bayhi, 86 A. 527.
- (e) To contest debts and charges on tableau.
Succession of Ames, 33 A. 1317.
- (f) To bring suits for benefit of succession when acting as beneficiary heir.
Succession of Lamm, 40 A. 312; *Gillaspie vs. Bank*, 80 A. 1814.

3. By Stockholder:

- (a) Suing corporation.
Life Association vs. Levy, 33 A. 1203.
- (b) Suing to prevent sale of corporate property by persons without authority.
State ex rel. Morey vs. Judge, 31 A. 323.
- (c) Suing on bond of liquidator.
12 A. 445.
- (d) Suing to enforce right to inspect books.
Legendre & Co., vs. Brewing Association, 45 A. 670; *Martin vs. Oil Works*, 28 A. 204; *Cockburn vs. Bank*, 18 A. 289.

4. By Tax-payers:

- (a) Contesting validity of municipal ordinance and contract tending to increase taxation.
Handy vs. New Orleans, 89 A. 107; *Johnson vs. Tax Collector*, 89 A. 584; *Tax-payers' Association vs. New Orleans*, 83 A. 567; *Conery vs. Waterworks*, 84 A. 770; *Compton vs. Zabriski*, 101 U. S. 601. But see *Bank vs. City*, 27 A. 446.
- (b) Appealing from judgment against parish decreeing a tax.
Flagg vs. St. Charles, 27 A. 319.
- (c) Mandamus police jury to erect new court house.
Watts and others vs. Police Jury, 11 A. 141.
- (d) But tax-payers can not sue in affirmance of municipal contracts which contain no stipulations *pour autrui*.
Loeber vs. N. O. & C. R. R. Co., 41 A. 1149.
However five tax-payers can sue by mandamus to enforce certain contracts designated in Act 133 of 1888.

5. By *Creditor*:

- (a) Suing for return of property of succession to administrator.

Neda vs. Fontinot, 2 A. 732.

- (b) Objecting to irregularities in proceeding by other creditor for forced surrender.

Letchford vs. Dannequin, 16 A. 149; 14 A. 424.

- (c) In seizure, pleading prescription against third opponent.

Maskell vs. Pooly, 12 A. 661.

- (d) Holding mortgage and settling up ownership of property in his debtor when debtor himself is estopped.

Logan vs. Herbert, 30 A. 727; *Spencer vs. Goodman & Bradford*, 33 A. 898.

- (e) Holding mortgage and urging nullity of sale, in defence to rule to erase mortgage.

Borde vs. Erskine, 33 A. 873.

- (f) Seeking to remove executor of succession qualified in probate proceedings, where another will has transferred estate to universal legatee.

State National Bank vs. Evans, 32 A. 464.

- (g) Suing for rent of seized property.

Stockton vs. Hyde, 5 A. 300; 21 A. 743; *Lamorere vs. Cox*, 32 A. 1048.

- (h) Appealing from judgment by wife against husband debtor.

Cooley vs. Cooley, 38 A. 194.

- (i) Requiring property omitted by insolvent to be placed on schedule.

Cosgrove vs. Creditors, 41 A. 274.

- (j) Annuling tax sale of debtor's property.

Workingmen's Bank vs. Lannes, 30 A. 871.

- (k) Forfeiting charter of Free Bank, under Sec. 284, R. S.

State ex rel. Wogan vs. Bank, 35 A. 562. But see *State vs. Citizens' Bank*, 31 A. 837; also *In Re La. Savings Bank*, 35 A. 196.

6. By *Surety of Tutor*:

- (a) To contest judgment upon account of tutorship.

Fusillier vs. Babineau, 14 A. 777.

- (b) To compel creditor to make proper imputation of payments.

Reusch & Co. vs. Keenan & Slawson, 42 A. 419.

15 OF THE RULES APPLICABLE TO ALL CIVIL ACTIONS.

7. By *Holder of Warrant* against General Fund to contest validity of special act of appropriation:

Klein vs. Treasurer, 42 A. 175.

When State intervenes in suit against Auditor to compel him to do unauthorized act.

State ex rel. Salomon & Simpson vs. Auditor, 28 A. 402.

8. By *Third Opponent*:

(a) Who may oppose all who have claims on property.

Buckner vs. Gordy, 28 A. 596.

(b) Who may contest judgment awarding privilege.

Converse, Kennett & Co. vs. Steamer Robinson, 15 A. 438.

9. By *Administrator and Curator*:

To institute revocatory action or action of simulation without reference to origin of claims.

Davis vs. Stern, 15 A. 177; Judson's Administrator vs. Connolly, 5 A. 400.

10. By *Warrantor*:

Who may defend title, to satisfy warranty.

Lea vs. Terry, 15 A. 429; Powell vs. Hayes, 81 A. 789.

11. By *State*, to contest validity of act of Legislature.

State ex rel. St. Cyr et al. vs. Auditor, 34 A. 201.

12. By *Executor*, appealing from judgment putting heirs in possession:

Succession of Charmbury, 34 A. 21.

Executor of wife and tutor of her minor children may appeal from order putting major heirs of husband in possession of one-half of community.

Succession of Baumgarden, 35 A. 675.

13. By *Attorney*, in seeking to revive judgment when fee has not been paid.

Martinez vs. Succession of Vives, 32 A. 805.

14. By *Nearest Male Relative of Minor*, in taking measures to protect minor's property.

Succession of Walker, 32 A. 321.

15. By *Sheriff or Constable*:

In suits for damages for property taken from his custody.

Robins vs. Brown, 32 A. 430; State vs. Judge, 15 A. 34.

16. By *City Recorder*, in using writs to uphold his jurisdiction.

State ex rel. Sheehan vs. Judge, 32 A. 315.

OF THE RULES APPLICABLE TO ALL CIVIL ACTIONS. 16-18

17. By *Co-owner*, in petitory action to recover whole property from trespasser.

Pearson vs. Grice, 6 A. 282; Becnel vs. Waguespack, 40 A. 112;
Gardere vs. Blanton, 85 A. 811.

18. By *Private Citizen*, to suppress a nuisance which does him special damage.

Blanc vs. Murray, 86 A. 162.

But, *aliter*, when injury is general—not particular.

Werges vs. Railroad, 85 A. 641.

19. By *Syndic*, in suing for damages for property destroyed or abstracted from mass.

Nouvet vs. Bollinger, 15 A. 296; McCloskey vs. Ingram, 17 A. 86;
Dwight vs. Simon, 4 A. 490.

20. By *State*, in cases under intrusion acts.

George vs. Tucker, 27 A. 67.

21. By *Police Jury*, in same class of cases.

Miller vs. Reid, 45 A. 162.

16. Right of Action Subsists Until When—In all actions which are to be brought at the end of a stated period, the right of action subsists until the last day has expired.

C. C. 2057, 2058, 2059; C. P. 818.

17. Natural Obligations—Natural obligations give no right of action, but what has been paid pursuant to those obligations is not subject to repetition.

Those are natural obligations, for which the law gives no right of action; they arise on contracts entered into by persons who, though possessed of sound discretion and judgment enabling them to make contracts, are nevertheless disqualified by law from contracting, as are the contracts of married women made without the authorization of their husbands.

C. C. 1759, 1758, 1757, 2302; Campbell vs. New Orleans, 12 A. 84.

18. Action of Repetition—He who pays through error what he does not owe, has an action for the repetition of what he has thus paid, unless there was a natural obliga-

19 OF THE RULES APPLICABLE TO ALL CIVIL ACTIONS.

tion to make such payment; but he must prove that he paid through error, otherwise it shall be presumed that he intended to give.

C. O. 1758, 1846, 2183, 2301, 2308, 2442, 3005; 20 A. 112; 14 A. 10; 12 A. 17.

1. Money must have been paid to person whom plaintiff did not owe.

Sientes vs. Odier & Co., 17 A. 153.

2. Taxes paid under ordinance void for want of legal formalities can not be recovered.

12 A. 24.

3. But *aliter* if property not subject to taxation.

19 A. 73.

19. **Illegal or Immoral Obligations**—Obligations contrary to justice, good faith or good morals, such as those by which a reward is promised to another to commit a crime, give no right of action to either party to enforce the execution of the contract.

But if the reward promised has been paid, no action can be brought to obtain the repayment of the amount.

C. O. 1898, 1896, 1896, 1756.

Maxims: Ex turpi causa non oritur actio. Nemo allegans suam turpitudinem est audiendus.

Contracts can not be enforced which are based on:

1. Confederate Treasury Notes.

Barrow vs. Pike, 21 A. 14; *Bank vs. Bank*, 21 A. 18.

2. Cotton contracts within Confederate lines.

State vs. Bank, 20 A. 468.

3. Fund for corrupt and improper influencing Legislature.

Durbridge vs. Slaughterhouse Co., 27 A. 676.

4. Agreement to divide salary of public office.

Glover vs. Taylor, 88 A. 685; *McGuire vs. Corwin*, 101 U. S. 112.

5. Pooling arrangements between competing railroad companies.

Railway Co. vs. Railway Co., 41 A. 981; *Gibbs vs. Baltimore*, 120 U. S. 408.

6. Concubinage.

Stringer vs. Mathis, 41 A. 985.

Aliter where concubinage is not the motive.

23 A. 294; 8 M. 11; 24 A. 625; 24 A. 591.

7. Corrupt understanding with member of city council who, through an interposed party, is real adjudicatee of a contract by the city.

Cummings vs. Saux, 80 A. 209.

20. Cause of Action Used as Exception—He who has a right of action to claim what is due to him, has a right yet more evident to use the same cause of action as an exception, in order to preserve his rights.

Maxim: Quæ temporalia sunt ad agendum, perpetua sunt ad excipiendum.

18 A. 598; 18 A. 714; 35 A. 751; 12 R. 472.

Thus: Deficiency in quantity of land sold may be set up in defence to action for the price, though action for reduction of price be prescribed.

Lafiton vs. Dolron, 12 A. 164.

Rule: Quæ temporalia does not apply, when.

See 28 A. 546; 35 A. 1015.

21. No. Abatement of Action, etc.—Actions do not abate by the death of one of the parties, after answer filed.

O. C. 945; C. P. 361, 121, 113, 120; R. S. 1105.

1. Heirs having accepted succession, are made parties.

Dirmeyer vs. O'Hern, 39 A. 961; Todd vs. Young, 16 A. 162; Bedford vs. Shelton, 18 A. 40; Lanata vs. Macera, 20 A. 426; Vincent vs. Sharp, 9 A. 463.

2. Marriage of woman plaintiff will not abate suit; husband made party by supplemental petition, which need not be served on defendant.

Flynn vs. Flynn, 21 A. 163.

3. Petition making parties must ordinarily be served.

Bedford vs. Shelton, 18 A. 40.

4. Where executor of deceased plaintiff files amended petition making himself party, defendant must be notified but can not claim delays.

Woodman vs. Richardson and McFee, 15 A. 508.

5. Death must be *proved* by affidavit or otherwise.

Hawkins vs. Dartest, 3 A. 547.

22-25 OF THE RULES APPLICABLE TO ALL CIVIL ACTIONS.

22. Actions Are Transmissible Property—Actions arising from obligations are the property of him in favor of whom they have been contracted; they are transmitted with his estate to his heirs, who may carry them on in their own name.

C. C. 945.

1. Actions arising from contract are heritable by general law. Some actions arising from torts or injuries to person are heritable by special statutes.

C. C. 2315; Act 71 of 1884.

2. Action does not survive favor of husband of deceased.

Walton vs. Booth. 84 A. 913.

3. Rights of action are seizable.

Nugent vs. McCaffrey, 88 A. 271; Jack vs. Harrison, 84 A. 733.

23. Actions Pass to Universal Successors—The universal successor, or successors by an universal title of a deceased person, such as his heirs or universal legatees, are entitled to the same actions and exceptions, as the person to whom they succeed; but they can not claim, on their own behalf, any right which he had not himself, for this reason, that no one can transfer a better title to another than that which he himself had.

C. C. 2236, 2242.

Maxim: Nemo plus juris ad alium transferre potest quam ipse habet.

Heirs can not sue for damages for life of tho *de cujus*. They have only such action as deceased had.

Vredenburg vs. Behan, 33 A. 627; See Act 71 of 1884.

24. Id.—The rule laid down in the preceding article takes place also with respect to the successors of a deceased person claiming a thing by virtue of a particular title; that is to say, by sale, donation or legacy, but so far only as concerns the thing itself, of which the deceased has thus disposed of in their favor.

25. Heirs and Universal Legatees Suable—Heirs or universal legatees may be sued for civil reparation of the in-

jury caused by the crimes or misdemeanors of the deceased, whose succession they have accepted, although no action was instituted for that purpose against the deceased during his life, and although neither he nor his heirs have been benefited by such an offence.

C. C. 2315, 3596; see *Beers vs Board of Health*, 35 A. 1188; *Dirmeyer vs O'Hern*, 39 A. 961.

1. But they can not be held liable in vindictive damages.

Edwards vs. Ricks, 30 A. 926.

2. Widow liable for one-half and heirs liable for other half, each for his virile portion, of damages caused by trespass of deceased.

Ibid.

CHAPTER III.

OF THE RULES PECULIAR TO THE DIFFERENT KINDS OF CIVIL ACTIONS.

SECTION I.

Of the Several Kinds of Personal Actions and of the Rules which Govern Them.

26. Personal Actions—A personal action lies against him who has bound himself towards another, personally and independently of the property which he possesses.

C. P. 3.

27. Personal Actions Lie Only Against Debtor, Heirs or Universal Legatees—Such action can only be brought against the debtor, or the obligor, or the person who directly represents him, such as universal heirs, or heirs by a universal title.

C. P. 3.

28. Grounds of Personal Actions—Personal actions are grounded on one of the four causes which give rise to

personal obligations. The causes are contracts, or quasi contracts, offences, or quasi offences.

29. Personal Actions Arising from Contracts—Personal actions arise from contracts, where one has bound himself for his own advantage, as by selling, purchasing, hiring or letting, or by any like contracts.

C. C. 1760.

30. Personal Actions from Quasi Contracts—Personal actions arise from quasi contracts when they are grounded on the obligations imposed upon him who has managed the affairs of another, without being authorized.

C. C. 2293.

31. Personal Actions from Offences—Personal actions arise from offences, as when one has become liable to another for the injury he has inflicted on him by some crime or offence, such as theft or slander.

C. P. 2815.

32. Personal Actions from Quasi Offences—Personal actions arise from quasi offences, when the ground of action is the injury done to another by one of those faults which are not considered as real crimes or offences.

C. C. 2315.

33. Direct and Equitable Actions—Personal actions arising from contracts, are divided into direct and equitable actions.

34. Direct Action—A direct, contradistinguished from an equitable action, is that which arises immediately from contracts, and binds *ipso facto* all who have been parties to it.

C. C. 1889, 1890.

35. Equitable Action—An equitable action is that which does not immediately arise from a contract, but from equity in favor of a third person, not a party to it, and for whose

benefit certain stipulations have been made; thus, if one stipulated in a contract entered into with another person, and as an express condition of that contract, that this person should pay a certain sum on his account, or give a certain thing to a third person, not a party to the act, that third person has an equitable action against the one who has contracted the obligation, to enforce the execution of the stipulation.

C. C. 1890, 1902-21.

(A) *Equitable actions:*

Suit by third person on forthcoming or indemnity bond, even without assignment of bond.

Wright vs. Oakey & Co., 16 A. 125.

(B) *No equitable action:*

1. Where obligation is penal.

St. Joseph's Association vs. Magnier, 16 A. 338.

2. Where obligation is not express or necessarily implied.

Gillis vs. Nelson, 16 A. 275.

(C) *Equitable action subject to all defences.*

Frelligh vs. Miller, 16 A. 418.

(D) *Stipulation in favor of third person having been accepted can not be revoked.*

Pecquet vs. Pecquet, 17 A. 204.

36. Direct and Contrary Actions—Certain contracts, from their nature, give rise to two species of personal actions in favor of the contracting parties; one of these is likewise termed *direct*, in contradistinction to the other, which is called a *contrary action*.

37. Direct Action—A direct action, in this acceptance, is that which arises out of a contract at the very moment of its being made, without the occurrence of any new cause since the contract; as, in the contract of loan termed *commodat*, where the action arises in favor of the owner of the thing against him to whom he has lent it, in order to recover it.

38. Contrary Action—The *contrary* action is that which arises from some cause which has occurred since the contract, and has for its object the obtaining of some indemnity, such as the action which the law gives to the borrower in the loan called *commodat*, for the recovery of the disbursements which he has been obliged to make for the preservation of the thing lent to him.

39. Actions from Synallagmatic Contracts—It is of the essence of all synallagmatic contracts—that is to say, of those which contain reciprocal obligations between the parties, to give rise to two species of direct actions.

Thus, in the contract of sale, the purchaser has an action against the seller to compel him to deliver the thing sold, and the vendor has likewise his action against the purchaser to compel him to pay the price.

40. Personal Actions Against Heirs—Personal actions, being attached to the person of the debtor, may be brought against all his heirs, should he die without having extinguished it; but each of them will only be liable for the amount and portion which he has inherited from the debtor's estate.

C. O. 1426, 1427.

SECTION II.

Of the Real Action, Its Subdivisions and the Rules Peculiar to it.

41. Real Actions—A real action lies against him who, without having contracted any obligation towards the plaintiff, is nevertheless bound towards him, as possessor of the immovable property of which that plaintiff claims the ownership or the possession, or on which he claims to exercise some immovable right.

C. P. 4, 12; C. O. 3476.

(A) *Real actions are:*

1. Petitory action.
2. Possessory action.
3. Action of boundary.
4. Action of jactitation or slander of title.
5. Proceeding by monition.
6. Hypothecary action.

(B) *As to monition.*

See *Fazende & Seixas*, praying for monition, 85 A. 1147; Acts of 1874, p. 118 and 1878, p. 157.

(C) *Defences are:*

1. Denial of plaintiffs' possession.
2. Denial of slander of title.
3. Admission of slander of title.

Dalton vs. Wickliffe, 85 A. 887.

(D) *Where last mentioned defence is made without claim of specific title in defendant, court orders defendant to bring petitory action.*

Id., and *Packwood vs. Dorsey*, 4 A. 90.

(E) *Where claim of title is made—that issue is tried with defendant as plaintiff in petitory action.*

Dalton vs. Wickliffe, 85 A. 887, and cases cited.

42. Real Actions—The real action gives the right to follow the thing in whatever hands it may be found; but as relates to hypothecary actions, this rule is subject to some modifications which are established in the paragraph which treats of that action.

C. P. 4, 61.

§ 1.

Of the Petitory Action.

43. Petitory Action—The petitory action, or one by which real property, or any immovable right to such property may be subjected, is claimed, must be brought against the person, who is in the actual possession of the immovable, even if the person having the possession be only the farmer or lessee.

But if the farmer or lessee of a real estate be sued for that cause of action, he must declare to the plaintiff the name and the residence of his lessor, who shall be made a party to the suit, if he reside in the State, or is represented therein, and who must defend it in the place of the tenant, who shall be discharged from the suit.

42 A. 666; C. C. 2704; C. P. 5, 6.

(A) Demand for recognition of title makes action petitory.

Millaudon vs. Ranney, 18 A. 196.

(B) Against whom brought:

1. Lessee in possession.

Bledsoe vs. Irwin, 53 A. 619.

2. Person in actual possession.

Scott vs. Bowles, 3 A. 637.

(C) What is actual possession.

Barnes vs. Gaines, 3 R. 814, also 1 R. 162.

(D) Where lessor resides out of State, lessee must defend.

Plummer vs. Schlatre, 4 R. 29.

(E) Quasi petitory action:

Suit by creditors of husband or community or syndic to recover immovable property standing in name of wife.

Gogreve vs. Dehon, 41 A. 245.

(F) Right of defendant:

1. May show title other than that attacked.

Villey vs. Jarreau, 85 A. 542; Villey vs. Jarreau, 85 A. 294.

And can not subsequently set up other title not pleaded.

Schaffer vs. Soudy, 14 A. 582.

2. May contest validity of judgment under which plaintiff acquired it.

Surgt vs. Colmer, 22 A. 20; Cronan vs. Cochran, 27 A. 121.

44. Plaintiff Must Make Out Title—The plaintiff in an action of revendication must make out his title, otherwise the possessor, whoever he be, shall be discharged from the demand.

C. P. 123; C. C. 1282.

(A) Plaintiff must recover on strength of his own title, not on weakness of defendant's.

Castagnie vs. Boullris, 44 A. 944; Stille vs. Shnell, 41 A. 816; Clarkston vs. Vincent & Co., 32 A. 614, 42 A. 350, 42 A. 846, 42 A. 527; Bienvenu vs. Factors and Traders' Ins. Co., 33 A. 216; Ferriere vs. City, 35 A. 209; Dixie vs. Mandell, 28 A. 499; Thompson vs. Meyers, 34 A. 617, 28 A. 326; Landreux vs. Foley, 13 A. 114; Hiestand vs. Forsythe, 12 A. 372; 35 A. 609; Buras vs. O'Brien, 42 A. 527.

Where State has parted with legal title to lands, she can not maintain petitory action to recover same.

State vs. V., S. & P. R. R. Co., 44 A. 962.

(B) Plaintiff may show that defendant holds under him.

Broughton vs. King, 9 R. 216.

(C) Against mere trespasser prima facie title antedating his possession sufficient.

41 A. 820, 896; 15 A. 76; 23 A. 274; 28 A. 145; 41 A. 816; 15 A. 454.

(D) Plaintiff may meet title opposed to him by all means of attack, as if specially pleaded, even when such title is tax sale.

Telle vs. Fish, 34 A. 1243; Hickman vs. Dawson, 33 A. 438; McMasters vs. Stewart, 11 A. 546; Maillot vs. Wesley, 11 A. 467.

(E) Question of title tried by direct action:

1. Not on exception.

40 A. 690.

2. Not by collateral attack.

23 A. 175.

3. Not by rule.

29 A. 335; 24 A. 224.

4. See 30 A. 250.

(F) Defendant in action of slander of title setting up title in himself is plaintiff in petitory action, and must stand on his own title.

Gay vs. Ellis, 33 A. 249; Clarkston vs. Vincent & Co., 32 A. 613; Havard vs. Atkins, 24 A. 511; Sully vs. Spearing, 40 A. 558; Bidwell vs. Oavaroc, 27 A. 307.

(G) What title will support petitory action:

See Fluker vs. Doughty, 15 A. 678.

1. Certificate of final proof by Receiver of Land Office.

Simeon vs. Perrodin, 35 A. 983; Broussard vs. Broussard, 43 A. 921.

2. Patent from Government, even in vendor's name.

Stein Spring vs. Bennett, 16 A. 201; Gay vs. Ellis, 33 A. 252.

3. Marshal's deed, if accompanied with judgment.

22 A. 629.

4. Title derived from State when deed and registry and validity of tax forfeiture to State are shown.

Gatlin vs. Hutchinson, 36 A. 350.

5. Sheriff's deed, accompanied by writ and judgment.

Brinkman vs. Huyghe, 42 A. 110; Clarkston vs. Vincent & Co., 52 A. 618.

6. Judgment putting heirs in possession.

Chavanne vs. Frizoly, 26 A. 169.

But, coupled with title of de cujus.

Brown vs. Brown, 15 A. 169.

7. Purchase by members of church of property in social capacity, even when not incorporated.

African Church vs. N. O., 15 A. 442.

(H) Oldest title prevails if not successfully impeached.

Cole vs. Thompson, 35 A. 1028; Pierre vs. Blunt, 14 A. 345.

(I) Purchaser at sheriff's sale to maintain petytory action, must prove all legal requisites to give valid title, such as legal seizure by sheriff.

Corse vs. Stafford, 24 A. 262.

(J) What title will not support petytory action :

1. Sale a remere.

Miller vs. Shotwell, 38 A. 890; Howe vs. Powell, 40 A. 807; Howe vs. Austin, 40 A. 828.

2. Deed establishing only tenancy at will.

Sallabah vs. Marsh, 34 A. 1054.

3. Mere act of partition among heirs without proof of title in succession.

Brown vs. Brown, 15 A. 169.

4. Deed of trust, which is no muniment of title in Louisiana.

Marsh vs. Sevin et als., 28 A. 526.

5. Mere unrecorded, incomplete adjudication at sheriff's sale.

Thistle vs. Irosen, 37 A. 170.

(K) Rents and Revenues :

Unsuccessful defendant, though previously in good faith, owes rent and must account for revenues from judicial demand.

Durbridge vs. Crowley, 44 A. 74; Dufilho vs. Mayer, 27 A. 899.

45. Petytory Action by Owner of Undivided or Limited Interest—The petytory action may be brought by one who

has the ownership only of an undivided part of an estate, or of a real right to which such an estate is subjected, though his ownership may be limited to a certain period, or end by the occurrence of a certain event.

(A) Who can bring Petitory Action :

1. Absolute Owner.

Caze vs. Robertson, 14 A. 220.

(a) Adjudicatee, with deed.

Brinkman vs. Huyghe, 42 A. 111.

(b) Joint heir or joint owner.

Gordon vs. Penn, 26 A. 867.

(c) Ownership must exist at time of suit; subsequent acquisition unavailing.

15 A. 116.

2. Qualified or Conditional Owner.

Syndic may bring petitory action to subject property claimed by community to insolvent's debts.

Gogreve vs. Dehon, 41 A. 244.

(B) Who can not bring Petitory Action :

1. Mere trespasser.

Hebert vs. Lige, 29 A. 513.

2. Debtor whose property has been sold to pay his debts.

Tregre vs. Baudry, 23 A. 18; but see Bledsoe vs. Irwin, 88 A.

3. Lessee.

Girault vs. Zuntz, 15 A. 684; Young vs. Chamberlin, 15 A. 454.

4. Vendor or warrantor.

Girault vs. Zuntz, 15 A. 685.

§ 2.

Of the Possessory Action, and the Rules which Govern it.

46. Possessory Action—The possessory action, which is a branch of real actions, may be brought by any possessor of a real estate, or of a real right, who is disturbed either in the possession of the estate or in the enjoyment of the right, against him who causes the disturbance, in

order to be maintained in, or restored to the possession, whether he has been evicted or disturbed; provided his possession be accompanied by the qualifications hereafter required.

C. P. 6.

Demand for possession only characterizes actions as possessory.

Williams vs. Harmanson, 41 A. 708; Huyghe vs. Brinkman, 37 A. 240.

47. Possession Must Be as Owner, or Usufructuary—

The possessors entitled to bring these actions are those who possess as owners.

Persons entitled to the usufruct, or to the use of a real estate, and others having real rights growing from such real estate, may also bring their action, when disturbed in the enjoyment of their rights.

C. P. 60.

1. This action can not be brought for movable property.

Lange vs. Baranco, 82 A. 699.

2. Nor for immovable improvements.

Broussard vs. Dugas, 5 A. 585.

48. Possession in Name of Another: Tenants—Those who possess in the name of another, such as tenants, are not entitled to the possessory action, when disturbed in the enjoyment of the real estate which they possess in that quality, or even when they are expelled; but they have their remedy against the person in whose name they possess, and they are bound to apprise him of the disturbance they have experienced, by personal notice, if he be within the State, and by advertisements in the newspapers, if he be out of the State, in order that he may quiet them if it can be done; otherwise they lose all right to claim damages from him, and will be liable to him besides for all the loss and damages which he may have sustained through their neglect.

C. P. 52; C. C. 2696, 2724.

1. Personal formal notice by lessee necessary.

Fox vs. McKee, 31 A. 67.

49. Requisites of Possessory Action—In order that the possessor of a real estate or one who claims a right to which such estate may be subjected, may be entitled to bring a possessory action, it is required:

1. Real and Actual Possession—That he should have had the real and actual possession of the property at the instant when the disturbance occurred; a mere civil or legal possession is not sufficient;

2. Quiet and Undisturbed Possession—That he should have had that possession quietly and without interruption, by virtue of one of the titles prescribed in the 47th Article, for more than a year previous to his being disturbed; provided the possession of less than one year be sufficient, in case the possessor should have been evicted by force or by fraud;

3. Real Disturbance—That he should have suffered a real disturbance either in fact or in law;

4. Suit to Be Brought Within One Year—That he should have brought his suit, at the latest, within the year in which the disturbance took place.

Good or Bad Faith Immaterial—When the possession of the plaintiff is accompanied with all those circumstances, it matters not whether he possesses in good or in bad faith, or even as a usurper, he shall nevertheless be entitled to his possessory action.

C. P. 53, 59, 150; C. C. 3456, 3536.

(A) Requisites of Possessory Action.

1. Plaintiff must have had actual and real possession.

White vs. Sheriff, 32 A. 130; *Young vs. Wilson*, 34 A. 385; *Arrowsmith vs. Durel*, 14 A. 862; *Gardiner vs. Thibodeaux*, 14 A. 742; 12 A. 208; *Henderson vs. Smith*, 4 A. 525; *Benton vs. Roberts*, 2 A. 749; 28 A. 272; *Dooley vs. Gibson*, 32 A. 191; *Taylor vs. Telle*, 45 A. 124.

2. Plaintiff's possession must have been for over a year.

Young vs. Wilson, 34 A. 385; *Dickson vs. Marks*, 10 A. 518.

3. Plaintiff must allege and prove real disturbance.

(a) Seizure and advertisement of sale amount to such disturbance.

White vs. Sheriff, 82 A. 180.

(b) Disturbance essential.

Deuchatel vs. Robinson, 24 A. 176.

(B) Question of title not involved; sole questions are possession and disturbance.

Huyghe vs. Brinkman, 88 A. 886; Sallabah vs. Marsh, 84 A. 1053; Lott vs. Mills, 21 A. 559; Young vs. Wilson, 84 A. 386; Chain vs. Blanchard, 6 A. 66; Dawson vs. Hedden, 4 A. 515; Chaffe, Shea and Loye vs. Abercrombie, 26 A. 685; St. Amand vs. Long, 26 A. 166.

(C) Defendant can not attack plaintiff's title.

Frazier vs. Hardee, 21 A. 542.

(D) All evidence of title rejected except—

1. To mitigate damages.

Sallabah vs. Marsh, 84 A. 1054.

2. To support right to possession, in special cases required by statute.

Fix vs. Succession of Dierker, 80 A. 175.

50. Disturbance—The disturbance which gives rise to the possessory action may be of two kinds; disturbance in fact, or disturbance in law.

C. P. 298, §5.

51. Disturbance in Fact—Disturbance in fact occurs when one, by any act, prevents the possessor of a real estate, or of a right growing from such an estate, from enjoying the same quietly, or throws any obstacle in the way of that enjoyment, or evicts him through violence, or otherwise.

52. Disturbance in Law—Disturbance in law takes place when one, pretending to be the possessor of a real estate, says that he is disturbed by the real possessor, and brings against the latter the possessory action; for in such a case the true possessor is disturbed by this action. and may also bring a possessory action, in order to be quieted in his possession.

But in no case shall the mere demand in revendication of a real estate, or of a real right, be considered as a disturbance in the enjoyment of a possessor, and entitle him to bring a possessory action.

C. P. 48.

53. Required Proof—The plaintiff in a possessory action needs only, in order to make out his case, to prove that he was in possession of the property in question, in the manner required by this Code, and that he has been either disturbed or evicted within the year previous to his suit.

So that when the possession of the plaintiff, or the act of disturbing him is denied, no testimony shall be admitted, except as to the fact of the possession, or as to the act of disturbance, and all testimony relative to property shall be rejected.

C. C. 3455, 3456; C. P. 49, 59; see *Frazier vs. Hardee*, 21 A. 541.

54. Petitory Waives Possessory Action—If the possessor who has been disturbed in or evicted from his possession, bring a petitory action, that is to say, claim the ownership of the property, he shall not afterwards be entitled to the possessory, by dismissing the petitory action.

The same rule shall govern, if he sue at the same time for the possession and the ownership of the property; he shall then be considered as having renounced the possessory in order to resort to the petitory action.

C. P. 150, 152.

55. No Cumulation Without Consent—Petitory and possessory actions shall not be cumulated or joined together, except by consent of parties.

Therefore, he who is sued in a possessory action can not bring a petitory action until after judgment shall have, been rendered in the possessory action, and until, if he has been condemned, he shall have satisfied the judgment given against him.

Petitory and possessory actions can not be cumulated without consent.

O. P. 149, 150; St. Amand vs. Long, 25 A. 165.

56. Petitory May Follow Possessory Action—Nevertheless, if the judgment rendered in a possessory action require a settlement, which may occasion delay, then the judge shall fix a term for making such settlement, at the end of which the petitory action may be brought.

57. Possessory Merged into Petitory—If the plaintiff in a possessory action consent that it be cumulated with the petitory action, he shall be considered as having renounced the possessory action, and the judgment shall decide only the question of ownership.

O. P. 150, 48, 46, 54.

58. Sequestration of Property—When each of the parties, in a possessory action, alleges that he has the possession of the property, and both of them bring suit on the allegation of having been disturbed in their possession, if the fact of possession be doubtful and uncertain, the judge shall maintain in possession the one of the parties who shall appear to him to have the most apparent possession, or he may, at the request of one of the parties, order the sequestration of the property until the question of ownership shall have been decided.

O. C. 2979; O. P. 53, 274.

59. Prescription of Possessory Action—If one who is disturbed in or evicted from his possession, suffer a year to elapse without bringing a possessory action, that action shall be prescribed, and he must then resort to a petitory action.

O. C. 3536; O. P. 49, 53.

60. No Possessory Action for Personal Property—Possessory actions can not be maintained for personal property, the action in revendication for that species of

property having nothing in common with the extraordinary privileges secured to the owners of real estate, or of real rights, when they are disturbed in their enjoyment.

C. P. 47; *Lauge vs. Baranco*, 32 A. 699.

§ 3.

Of the Hypothecary Action and its Rules.

61. Hypothecary Actions—An hypothecary action is a real action, which the creditor brings against the property which has been hypothecated to him by his debtor, in order to have it seized and sold for the payment of his debt.

C. C. 3399; C. P. 4, 42.

(A) Hypothecary Action—First requisite is hypothecary debt, which may be:

1. **Judicial.** As judgment.

Gallagher vs. Hebrew Congregation, 35 A. 529; *Bell vs. Railroad*, 34 A. 785; *Massey vs. Finch*, 24 A. 29; 29 A. 116.

2. **Legal.** As legal mortgage of:

(a) **Minor.**

Skipwith vs. Glathary, 34 A. 28; *LaPlace vs. Haydel*, 19 A. 363; 41 A. 448.

(b) **Wife.**

Jumonville vs. Sharp, 27 A. 461; *Gale vs. Matta*, 7 A. 140.

(c) **Interdict.**

Reggio vs. Blanchin, 26 A. 532.

3. **Conventional.** As under ordinary mortgage.

And purchaser under *vente a remere* may enforce security by action quasi hypothecary.

How. vs. Powell, 40 A. 810.

(B) When hypothecary action is necessary:

When property is in third hands, and plaintiff's mortgage was without a *pact de non*.

Reggio vs. Blanchin, 26 A. 532; *Leonard vs. Sheriff*, 37 A. 303; *Marquise de la Villa Palma vs. Abot*, 21 A. 11; *Taylor vs. Pipes*, 24 A. 551; *Williams vs. Morancy*, 8 A. 227; *Massey vs. Finch*, 24 A. 29.

(C) When not necessary:

1. When *pact de non alienando* exists, creditor may seize direct.

Dodds vs. Lanoux, 45 A. 288; *Bullier, wife, vs. Huppenbauer*, 23 A. 839; *Stevens vs. Pinneo*, 26 A. 618.

(D) Where Hypothecary Action Brought:

In parish where property is situated.

C. P. 163; Gantt, vs. Eaton & Barstow, 25 A. 508; 15 A. 346; Generes vs. Simon, 21 A. 683. See Act 64 of 1876, p. 106, amending Art. 163, C. P.

(E) Nature of Action when Based on Judgment:

It is original, not a continuation of previous suit.

Gentes vs. Blasco, 20 A. 405.

(F) Necessary Parties to Action:

1. Mortgagor.

Reggio vs. Blanchin, 26 A. 532; O'Bryan vs. McVey, 26 A. 609.

2. Legal representatives of deceased mortgagor.

O'Hara vs. Folwell 26 A. 570.

3. Executor and heirs, present or represented in this State.

Cronan vs. Executors, 9 A. 302; Labauve vs. Slack, 31 A. 140.

(G) Not Necessary Parties:

Minor co-heirs of plaintiff where property liable to all.

Skipwith vs. Glathary, 34 A. 28.

(H) Against What Property Action Brought:

1. Only specially mortgaged property when based on conventional mortgage.

Labauve vs. Slack, 31 A. 134.

2. Only property on which legal or judicial mortgage reposes —and that though title be not recorded.

Gallaughier vs. Hebrew Congregation, 35 A. 829; Dickson vs. Hynes, 35 A. 684; Logan vs. Herbert, 30 A. 727.

3. Against part only of the property hypothecated, if creditor so desires.

Burgess vs. Gordy, 32 A. 1296.

4. Debtor can not divide the mortgage.

Id., and Bayley vs. Tate, 10 R. 45; Powell vs. Hayes, 31 A. 739.

(I) Prescription of Action:

1. Right of Hypothecary Action survives as long as Hypothecary debt.

Judgment. Ten years.

Wade vs. Caspari, 24 A. 211; Gentes vs. Blasco, 20 A. 405.

2. Oitation in hypothecary action does not interrupt prescription of judgment.

Chapman vs. Bank, 31 A. 336.

3. But prescription is interrupted by reinscription of judgment.

Vanwickle vs. Garnett, 14 A. 106; but see Adie vs. Prudhomme, 16 A. 343.

(J) In What Court Brought:

State Court has jurisdiction of hypothecary action to enforce mortgage resulting from inscription of Federal judgment.

Adams & Company vs. Coon, 87 A. 305.

(K) Who may bring action:

Creditor under judicial mortgage, as where judgment creditor, by this action, subjects property to satisfaction of judgment.

Gallaughier vs. Hebrew Congregation, 35 A. 829; Hamilton vs. Bank, 89 A. 982.

(L) The hypothecary action based on judicial mortgage depends upon existence of:

1. *Money Judgment*—Hence no judicial mortgage results from recording a judgment ordering usufructuary to give a fixed bond.

Succession of Dickson, 87 A. 795.

2. *Valid Judgment*—Not one void for radical nullities.

As unsigned judgment.

Marchal vs. Hooker, 27 A. 454.

3. *Registry of judgment*, because until then no judicial mortgage exists.

Chaffe & Sons vs. Walker, 88 A. 85.

And recorder's certificate *prima facie* evidence of recordation.

Taylor vs. Pearce, 15 A. 564.

(M) No judicial mortgage exists and no hypothecary action based thereon:

1. When property of insolvent railroad company was in hands of receiver at time of registry of judgment.

Bell vs. Railroad Co., 84 A. 793.

2. When judgment in attachment suit is purely *in rem*.

Herber vs. Abbott, 89 A. 1112.

(N) Who may bring hypothecary action (continued).

1. By creditor under a legal mortgage:

(a) By a minor, after his tutor's account has been homologated by the court.

Skipwith vs. Glathary, 84 A. 28; Mayer vs. Brittin, 84 A. 986; Gibbs vs. Lumm, 29 A. 530.

(b) But minor may sue before rendition of account by tutor, when he has absconded and demand or settlement is impossible.

Trezevant vs. Holly, 24 A. 566; Brown vs. Sadler, 18 A. 205; Cummings vs. Erwin, 15 A. 289.

- (c) Hypothecary action, based on minor's mortgage does not lie when legal mortgage released by acceptance by former minor of tutor's personal obligations in lieu thereof.

Kelly vs. Sandidge, 30 A. 1190.

(O) *Other hypothecary actions.*

1. By a wife.

Jumonville vs. Sharpe, 27 A. 461.

2. By an interdict's curator against intermeddler.

Riggio vs. Blanchin et al., 26 A. 532.

3. By privileged creditors.

C. P. 709; Troendel vs. DeBouchel, 23 A. 759.

(P) *Scope of judgment in hypothecary action.*

1. It affects only property proceeded against.

Gale vs. Matta, 7 A. 140; Desobry vs. Carmena, 9 A. 180; Labauve vs. Slack, 31 A. 134.

2. It orders defendant to give up the property or pay the debt.

Id.

(Q) *Effect of hypothecary action:*

1. Under former jurisprudence, property could be sold by debtor or third possessor:

Barelli vs. Delassus, 16 A. 280; Cantereau vs. Lacaze, 9 A. 257.

2. *Aliter*, now, under Act 3 of 1878, p. 31, which, amending Art. 2453, C. C., reads: "The thing claimed as the property of the claimant can not be alienated pending the action, so as to prejudice his right. If judgment be rendered for him, the sale is considered as a sale of another's property, and does not prevent him from being put in possession by virtue of such judgment. Nor shall it be lawful for debtors or third possessors of property, subject to a mortgage of any kind, to transfer or alienate such property, pending an action to enforce the mortgage, and any transfer or alienation made in contravention of the provisions of this article shall have no effect as against the plaintiff or plaintiffs in such pending action."

62. Hypothecary Action Follows Property—The hypothecary action, like all real actions, follows the property to which it is attached, in whatever hands it may be found,

but it is subject to different rules, according as the property may be in the possession of the debtor, or of his heirs, or of third persons.

C. C. 8399; C. P. 4, 42, 784.

1. The hypothecary action follows the property.

Hamilton vs. Bank, 29 A. 982.

2. Creditor by mortgage importing confession of judgment may proceed *via executiva*, notwithstanding death of mortgagor, and without provoking administration.

Randolph vs. Chapman, 21 A. 486; Boguille vs. Faille, 1 A. 204; 31 A. 52, 115.

3. And even during administration.

McCalop vs. Fluker, 12 A. 551; Succession of Wilson, 12 A. 591.

4. But not *via ordinaria*.

State vs. Leekie, 14 A. 641.

5. Necessary allegations in hypothecary action.

34 A. 964.

63. Hypothecary Action Against Debtor on Title Importing Confession—When the hypothecated property is in the hand of the debtor, and when the creditor, besides his hypothecary right, has against his debtor a title importing a confession of judgment, he shall be entitled to have the hypothecated property seized immediately and sold for the payment of his debt, including the capital, the interest, and the costs, pursuant to the rules provided hereafter for executory proceedings.

C. P. 98, 782; C. C. 3398.

64. When Creditor Has No Executory Title—If the creditor has no executory title against his debtor, and the latter be in possession of the hypothecated property, the former can only seize and sell such property, after having obtained judgment against the debtor in the usual form.

65. Hypothecary Action Against a Single Heir—If the debtor has died leaving a single heir who has accepted the succession, the hypothecary creditor may act against that heir, in the same manner as he would have done

against the debtor himself, that is to say, either by pursuing the executory or the ordinary mode of proceeding, according to the tenor of the hypothecary act.

C. C. 1053, 1417, 1418, 1421, 1433; C. P. 734, 735.

66. Same Action Against Several Heirs—If, on the contrary, the deceased debtor leave several heirs, and have accepted the succession, in such a case it must be ascertained whether the hypothecary act imports a confession of judgment or not.

If so, and there have been no partition of the estate among the heirs, the creditor shall be entitled to seize and sell the hypothecated property, as if the original debtor were still alive.

But if there has been a partition among the heirs, and the hypothecated property has fallen to the share of one or more of them, the creditor may obtain an order of seizure against those heirs, and sell the property for the amount of his claim, leaving to them their recourse against their co-heirs for their proportion of the debt.

C. P. 121.

1. Partition and putting heirs in possession winds up the estate.
Freret vs. Heirs of Freret, 31 A. 506.

2. Executory process on mortgage importing confession of judgment may issue notwithstanding death of debtor.
Randolph vs. Chapman, 21 A. 496.

67. Hypothecary Action Against Heirs on Title not Importing Confession—But if the hypothecary act do not import confession of judgment, the creditor can not seize and sell the hypothecated property in the possession of the heirs of his debtor, or of any one of them, until he has obtained a judgment against each one of the heirs, for such a part of the debt as he is bound to pay, according to the share he has inherited, unless the creditor prefer to have the judgment executed personally against the heirs or their property, for such sums as each of them has been adjudged to pay.

C. P. 121.

68. Hypothecary Action Against Third Person—If the hypothecated property be neither in the possession of the debtor nor of his heirs, but in that of a third person, the creditor has his action against that person, in order to compel him either to give up the property or pay the amount for which it stands hypothecated. This is the hypothecary action, properly speaking.

C. C. 3398, 3400.

(A) Who is Not a Third Person.

1. Lessee.

Penn vs. Citizens' Bank, 32 A. 202.

2. One who assumed the mortgage debt.

Henry vs. Goldman, 27 A. 670; Boissac vs. Downs, 16 A. 188; Duncan vs. Elam, 1 R. 185; Lee vs. Packard, 25 A. 397; Ricard vs. Harrison, 19 A. 181.

3. Legatee, not in possession.

Succession of Porter, 5 R. 96-100.

(B) What Defences Third Possessors May Make.

Denial of hypothecary debt:

1. When Judicial: He may deny validity of judgment, and attack it.

Marshall vs. Hooker, 27 A. 454; Wade vs. Caspari, 24 A. 211.

2. When Legal: He may deny existence of legal mortgage.

Skipwith vs. Glathary, 34 A. 84; Kelly vs. Sandidge, 30 A. 1190.

3. When Conventional: He may contest validity and existence of mortgage.

State vs. Citizens' Bank, 33 A. 705.

(a) Except where the recitals of his own title estop him.

Schepp vs. Smith, 35 A. 1.

(b) And he is not entitled to defences that vendor could not urge.

Gallaughier vs. Hebrew Congregation, 35 A. 829.

(c) Especially when *pact de non* exists.

Lee vs. Packard, 25 A. 397.

(C) Rights to Improvements.

1. He may claim improvements on mortgaged property made by him, and all necessary and useful disbursements.

Bank vs. Miller, 44 A. 199; Bridges vs. Simonton, 28 A. 830; Linn vs. Dee, 31 A. 217.

2. But he is liable for fruits and revenues after notification of seizure.

Id.

(D) What defences third possessor can not make:

1. Attack on title of his own author.

Boone & Cockerham vs. Carroll, 35 A. 281.

2. Set up title in another person.

Heard vs. Patton, 27 A. 547.

(E) Effect of the Pact de Non. It gives creditor the right:

1. To seize and sell notwithstanding prior seizure by junior mortgagee in another court.

Troendel vs. De Bouchel, 33 A. 753.

2. To ignore subsequent transfers and proceed *via executiva* against original mortgagor.

Succession of Thompson, 42 A. 118; Avegno vs. Schmidt & Ziegler, 35 A. 535; Taylor vs Pipes, 24 A. 553; Bank vs. Miller, 44 A. 200; Gay vs. Hebert, 44 A. 302; Bank vs. Webre, 44 A. 334.

But such mortgage creditor may sue subsequent vendees by regular hypothecary action.

Id.

3. Holder of Mortgage with Pact may, under judgment, recognizing mortgage seize under *fi. fa.* regardless of alienations, without notice to or process against third possessor.

Levy vs. Lake, 43 A. 1034; Bienvenu vs. Ins. Co., 33 A. 213.

69. Demand and Notice in Hypothecary Action—If, thirty days after the amicable demand, made from the debtor or his heirs, of the payment of an hypothecary debt, it has not been fully discharged, the creditor may bring his action against the third possessor of the property hypothecated to him, to have it seized and sold, if that third possessor have not, within the ten days after having been notified of such a demand, paid the amount of the hypothecary debt. including the interest and costs.

C. C. 8401.

(A) Demand and Notice:

1. Demand need not be judicial.

Boone & Cockerham vs. Carroll, 33 A. 281; Gomez vs. Courcelle, 3 A. 304.

2. Mere unavailing amicable demand sufficient; no judgment and *fi. fa.* and return *nulla* required.

Id.

(B) Necessity of Demand and Notice:

1. Demand and notice essential.

Gentes vs. Blasco, 15 A. 104; *Kelly vs. Sandidge*, 30 A. 1190; *Taylor vs Pipes*, 24 A. 554.

2. Not essential, however.

(a) When minor's tutor has absconded in hopeless insolvent condition, leaving no property.

Cummings vs. Erwin, 15 A. 289.

(b) When principal debtor is bankrupt.

King vs. Bowman, 24 A. 508; *Woodward vs. Dashed* 6 E. 407.

(c) When possessor has assumed the debt.

Taylor vs. Pipes, 24 A. 557.

3. Action premature before demand and notice.

Taylor vs. Pearce, 15 A. 564.

(C) Notice and Demand, How Proved:

Not by mere certificate of sheriff, such duty not being official.

Taylor vs. Pearce, 15 A. 564.

(D) Notice must be legal, not verbal by a friend or served on unauthorized person.

State vs. Judge. 16 A. 890.

70. Affidavit of Debt and Demand—But the creditor who brings this action must declare on oath, in the petition, that the debt for which he demands the seizure of the hypothecated property is really due to him, and that he has in vain demanded payment from his debtor thirty days previous to his bringing his suit.

C. C. 3402; C. P. 63, 98.

Oath. When not necessary:

When creditor proceeds *via ordinaria*.

Kelly vs. Sandidge, and cases cited, 30 A. 1190; *Wilcoxon vs. Maskell*, 8 A. 461.

71. Discussion—Nevertheless, if the third possessor, against whom the action is brought, be not personally bound for the payment of the debt, he may oppose the sale of the hypothecated property, if there be other hypothecated property in the possession of the original debtor, and require its previous discussion, pending which the proceedings as to the sale of the property shall be staid.

C. P. 715; C. C. 3367, 3366.

Plea of Discussion:

1. Only third person may plead.

Ricard vs. Harrison, 19 A. 181; see Art. 68.

2. Time of plea.

It must be *in limine*. See C. P. 338.

Boone & Cockerham vs. Carroll, 35 A. 284; Chaffe vs. Ludelling, 34 A. 962.

72. Designation of Property and Advance of Costs—The third possessor who requires discussion shall be bound to designate to the plaintiff the property of the principal debtor which he wishes to have discussed, and advance the costs required for carrying on the necessary proceedings, in order to execute this discussion.

He is not entitled to demand the discussion of such property of the principal debtor, which may be out of the jurisdiction of the tribunal of the place where the payment was to have been made, nor that of property in dispute, or out of the possession of the debtor.

C. C. 3847, 3404.

1. Advance of costs to discuss necessary.

Matthews vs. Kemp, 27 A. 203; Pipes vs. Norsworthy, 25 A. 560; Schmidt vs. City, 33 A. 18; Elmore vs. Robinson, 18 A. 652; Robechot vs. Folse, 11 L. 136, 22 A. 42.

2. No discussion of property which is out of possession of debtor.

Womack vs. Fluker, 13 A. 196.

73. No Discussion Against Privileged Creditor or Special Mortgagee—The exception of discussion can not be opposed to the privileged creditor, or to one who has a special hypothecation.

C. C. 3404.

Plea of discussion not received as against:

1. A privileged creditor.

Ricard vs. Harrison, 19 A. 181.

2. Special mortgagee.

Succession of Anger, 36 A. 264; Powell vs. Hayes, 31 A. 769; Burgess vs. Gordy, 32 A. 1298.

74. Payment of Debt—Retention of Possession—Third possessors of property which has been seized, owing to their failure of discharging the amount of the hypothecary debt, within ten days after having been notified that payment has been demanded of the hypothecary debt, may until the very day of the sale, recover possession of the hypothecated property, by paying the debt with interest, and all the costs incurred in the suit.

C. C. 3406, 3410.

CHAPTER IV.

WHERE ACTIONS ARE TO BE BROUGHT AND IN WHAT MANNER.

75. Actions Brought Before Competent Judges—Actions must be brought before competent judges.

SECTION I.

Of Judges, Their Jurisdiction, How Their Competency is Regulated.

76. Jurisdiction—Jurisdiction means the power of him who has the right of judging, or sometimes that word means also the space or extent of country over which the judge is entitled to exercise that power.

1. As to "Jurisdiction."

See State ex rel. Behan vs. Judge, 85 A. 1064; Succession of Weigel, 15 A. 70.

2. No collateral attack permitted on capacity of judge acting under color of right.

State vs. Williams, 85 A. 742; State ex rel. Williams vs. Pertsdorf, 83 A. 1413.

3. Nor of judge *ad hoc*.

Guilbeau vs. Cormier, 82 A. 981.

77. Degrees of Jurisdiction—Degrees of jurisdiction means the different tribunals before which the same suit

may be successively pleaded, and the rules established for proceeding in an inferior jurisdiction previous to taking the suit before a superior jurisdiction.

78. Kinds of Jurisdiction—There are several kinds of jurisdictions, according to the nature and extent of the powers delegated to the judge exercising it.

79. Civil and Criminal—The first division is into civil and criminal jurisdiction.

80. Civil and Criminal—Civil jurisdiction extends to all civil matters, and criminal jurisdiction comprises whatever relates to crimes and misdemeanors.

1. **Forfeiture of appearance bond or recognizance is criminal proceeding.**

State vs. Toups, 44 A. 836; 42 A. 416.

2. **Magistrate courts may enforce road duty (Act 112 of 1880), but for failure to serve can not punish offender by arrest or imprisonment.**

State ex rel. Long vs. Sikes, Justice, 44 A. 949.

3. **Proceeding to recover fine against railroad company for not posting bulletin board (Act 118 of 1890) is civil, not criminal proceeding.**

State ex rel. Scarborough vs. Judges, 43 A. 1164.

81. Special and General—Some judges exercise general, whilst others possess only special jurisdiction.

Judges having general jurisdiction are those who, in virtue of the law, take cognizance in all matters but such as are specially excepted from their jurisdiction.

Judges having special jurisdiction are such as have an exclusive jurisdiction in certain cases pointed out by law.

82. Exclusive and Concurrent—There are judges having exclusive jurisdiction, such as the special judges mentioned in the preceding article.

There are judges with concurrent jurisdiction—that is to say, having cognizance in matters of the same nature, though they hold their courts in the same place or district.

83. Equal—There are judges having equal jurisdiction—that is to say, that though they can only take cognizance of cases arising within a certain space, they have a similar jurisdiction as to the nature of cases which may be brought before them.

84. Original and Appellate—There are judges of original and judges of appellate jurisdiction.

Judges having original jurisdiction are those before whom suits are brought in the first instance.

Judges having appellate jurisdiction are those before whom appeals are brought by those who complain of the judgment of the court of the first instance, and who try the cause again, affirming or reversing the judgment of the inferior court.

85. Appellate Jurisdiction—The decision of some judges is subject to appeal; others decide in the last resort.

Judges subject to appeal are those whose decisions may be carried by appeal before a superior court having appellate jurisdiction.

Judges in the last resort are those whose judgment can not be appealed from.

86. Competency—In matters of jurisdiction, the right given to a judge to take cognizance of certain causes against certain persons within his jurisdiction, is termed *competency*.

87. Tests of Competency—In order to ascertain whether a judge be competent or not, three points must be taken into consideration:

1. The object or the amount in dispute.

2. The person of the defendant.
3. The place where the action is to be brought.

See *Wisdom vs. Buckner*, 81 A. 55.

Subsequent investiture of jurisdiction does not cure nullity of suit filed before incompetent judge.

Garola y Mora vs. Kerzac, 21 A. 754; *Edwards vs. Marin*, 29 A. 567.

88. Id., Object or Amount—To determine on the competency of a judge, as relates to the object or amount in dispute before him, it is necessary to examine what are his powers, what is the nature of the cause, and what is the amount of the sum.

89. Id., Person of Defendant—To determine his competency, as relates to the person of the defendant, the rule which requires that the defendant be sued at the place of his domicile or usual residence, must be observed. This rule is subject, however, to various exceptions, determined in the chapter which treats of judicial demands and of citations.

O. P. 162; see *Escande vs. Thibaut*, 32 A. 252.

90. Id., Place—To determine on his competency, as relates to the place where the action is brought, we must be governed by the rule which provides that a judge shall not exercise any jurisdiction beyond the limits of the territory assigned to him.

O. P. 162.

1. Judicial orders, which can be granted in chambers, *ex parte*, may be granted out of territorial jurisdiction.

Succession of Weigel, 17 A. 70.

2. In proceeding purely *in rem*, property in Onachita and West Feliciana, may be attached by process from District Court of Caddo, in which property was also attached.

Kahn & Bigart vs. Sipill, 85 A. 1069; but see *contra*, overruled. *Favrot vs. Delle Piano*, 4 A. 584.

3. But garnishment under *fi. fa.* must emanate from court of defendant's domicile.

Marqueze vs. LeBlanc, 29 A. 194.

91. Amount Claimed Fixes Jurisdiction—When the jurisdiction of the judge, before whom a suit is brought, is limited to a certain sum, the question of jurisdiction must be decided by the amount claimed, and not by the sum actually due, not including, however, the interest and the costs which have been subsequently incurred.

But if one, in order to give jurisdiction to a judge, demand a sum below that which is really due to him, he shall be presumed to have remitted the overplus, and after having obtained judgment for the sum he had claimed, he shall lose all right of action for that overplus.

C. P. 156, 172 (4).

1. Amount *bona fide* claimed fixes jurisdiction.

Kahn & Bigart vs. Sipill, 85 A. 1041.

2. No relief afforded *ultra petitionem*, defendant objecting.

Teal vs. Pirtle, 84 A. 872; *Denegre vs. Moran*, 85 A. 346; *Trimble vs. Sheriff*, 85 A. 874; *Payne vs. Anderson*, 85 A. 979; *State ex rel. University of Louisiana vs. Burke*, 84 A. 405; *Beck vs. Fleitas*, 87 A. 492.

92. Consent Can Not Vest Jurisdiction—The consent of parties can not render a judge competent to try a cause which, from its nature, can not be brought before him, or when the amount in dispute exceeds the sum over which he has jurisdiction. All judgments rendered in contravention of this provision shall be void.

(A) *Consensus non facit Jurisdictionem*.

1. Want of jurisdiction *ratione materiæ* can not be waived.

Edwards vs. Edwards, 21 A. 610; *Smith vs. Ins. Co.*, 83 A. 1073; *Heirs of Gee vs. Thompson*, 89 A. 510; *Riggs & Bro. vs. Bell*, 89 A. 1030.

2. And it will be noticed *ex officio* by the court.

Rogers vs. Goldthwaite, 82 A. 49; *Fields vs. Gagne*, 83 A. 839; *Denegre vs. Denegre*, 83 A. 689; 25 A. 510; *Tague vs. Ins. Co.*, 88 A. 456.

(B) *But want of jurisdiction ratione personæ may be waived*.

Ploni vs. Riley, 89 A. 808; *Stackhouse vs. Zunts*, 86 A. 531; *Stevenson vs. Whitney*, 88 A. 655; *Phipps vs. Snodgrass*, 81 A. 88; *School Board vs. Weber*, 80 A. 895; *Marqueze vs. LeBlanc*, 29 A. 194. Overruling former jurisprudence, 28 A. 285; 24 A. 515; 21 A. 258 and 551.

(C) *Nullity of judgment by incompetent court may be urged at any time.*

Hartman vs. Rentrope, 21 A. 662.

(D) *Ordinary judgment null when rendered by Probate Court after closing of administration.*

Augustin vs. Avilla, 29 A. 837.

93. Waiver of Jurisdiction—If one be cited before a judge whose jurisdiction does not extend to the place of his domicile, or of usual residence, but who is competent to decide the cause brought before him, and he plead to the merit, instead of declining the jurisdiction, the judgment given shall be valid, except the defendant be a minor.

C. P. 162

1. Plea to merits by other than a minor waives want of jurisdiction *ratione personæ*.

Stevenson vs. Whitney, 33 A. 658; Jex vs. Keary, 18 A. 81; Phipps vs. Snodgrass, 31 A. 88; Marqueze vs. LeBlanc, 29 A. 195.

2. Judgment by default against defendant personally cited will be *res adjudicata* on question of residence.

Goodrich vs. Hunton, 31 A. 582.

3. Party can not contradict his jurisdictional allegations to defeat his opponent's appeal.

State ex rel. Breaux vs. Judges, 34 A. 1220.

94. Lis Pendens—The same cause can not be brought before two separate courts, though they be possessed of concurrent jurisdiction, except by discontinuing the suit first brought before the answer is filed.

Hence, if the same suit be brought before two separate courts, having concurrent jurisdiction, the judge before whom the action was first brought, shall sustain his jurisdiction, and the defendant shall be entitled to have the cause dismissed by the other court, and to recover costs.

Nevertheless, if the defendant, instead of claiming to be dismissed, answer in the two actions, in the two separate courts, the first judgment rendered by either of them shall be valid and executory against the party cast in the

action. All proceedings shall be staid in the other court, and the plaintiff dismissed after paying the costs.

C. P. 885, 492, 532; *City vs. Railroad*, 42 A. 16.

1. Plea of *Lis Pendens* must be specially pleaded in lower court.
Succession of Townsend, 87 A. 409.

And the two suits must have same object.

Express Co. vs. Haven, 41 A. 811.

2. First court obtaining actual jurisdiction, when concurrent, is entitled to proceed to final adjudication.

Taylor vs. Carroll, 29 How. 588; *Poutz vs. Bistes*, 15 A. 686; *Peale vs. Phipps*, 14 Wall. 368; *Haines vs. Carpenter*, 1 Woods, 262; *Shelly vs. Bacon*, 10 How. 56.

3. An Act to Prevent Conflict of Jurisdiction in Orleans Parish.—Act 86 of 1870, p. 119: "SECTION 1. That whenever a suit or judicial proceeding is instituted in any of the courts of the parish of Orleans, in this State, where such court has jurisdiction, all parties to such suit shall be confined exclusively to such court, for the trial of all issues or matters that may arise in the course of such litigation, or out of the judgment rendered in such litigation; and no other judge shall have jurisdiction to grant orders of injunction, sequestration, provisional seizure, arrest, prohibition, quo warranto, or any other order by which the proceedings in such litigation or judgment rendered therein or the property in litigation, or persons of the parties in litigation, shall be staid or in any manner interfered with or interrupted; nor shall any other judge grant any of the above orders in favor of any party not a party to such litigation or judgment, claiming to have an interest therein or to be affected thereby, but that all such orders shall be granted by the judge before whom the original suit or judicial proceeding was instituted. *Provided*, that no provision in this section shall apply to the Supreme Court or the judges thereof, etc."

SECTION II.

Of the Mode of Bringing Civil Suits, of Suits and of Parties Litigant.

95. Suits—Actions are brought before the courts by what is termed suits.

What is "suit."

See *Weston vs. Charleston*, 2 Peters, 464.

96. Suit—Definition—A suit is a real, personal or mixed demand, made before a competent judge, by which the parties pray to obtain their right, and a decision of their disputes.

In that acceptance the words suit, process and cause, are almost synonymous.

C. P. 2; see *Starns vs. Goodwyn*, 43 A. 307.

97. Proceedings are Ordinary, Executory, Summary—Civil actions may be prosecuted, according to the nature of the case, by three kinds of proceedings, to-wit:

Ordinary, executory, or summary.

98. Id., Ordinary—The proceedings are ordinary when citation takes place, and all the delays and forms of law are observed.

Executory—They are executory when seizure is obtained against the property of the debtor, without previous citation, in virtue of an act or title importing confession of judgment, or in other cases provided by law.

Summary—They are summary when carried on with rapidity, and without the observance of the formalities required in ordinary cases, as when courts provide for the administration of vacant successions, and the property of minors and absent heirs.

Summary proceedings are due process of law and are constitutional.

C. P. 63, 732, 734; *State ex rel. Morgan vs. Kennard*, 25 A. 242; 10 A. 764; 11 A. 373.

99. Plaintiff and Defendant—In order to constitute a suit or action, there must be at least two parties present or duly represented, though one of the two may fail to appear; it is therefore that they are called the principal parties to the suit.

C. C. 2065.

100. Id.—The plaintiff is he who sues another for something which he says is due or belongs to him.

The defendant is one against whom this suit is brought.

101. Warrantors, Intervenor, Third Opponents—Besides the plaintiff and defendant, there are often other parties to the suit, such as warrantors, third persons intervening, and parties opposing; but such parties, whether plaintiffs or defendants, as the case may be, are only so incidentally and subsidiarily.

C. P. 362.

CHAPTER V.

WHAT PERSONS ARE ENTITLED TO BRING ACTIONS.

102. Who May Sue—Those who are disqualified from contracting are generally disqualified from suing.

The exceptions to this rule are provided in the following articles.

C. P. 28, 24.

(A) *Necessary parties:*

Those who have an interest in the subject matter of the litigation should be before the court. Thus the following are necessary parties to the following actions:

1. **Action of nullity of judgment**—all parties to the judgment.
Willis vs. Peet, 26 A. 156; see Nullity of Judgment, Post.

2. **Heirs must join with executor in—**

(a) *Hypothecary action.*

Labauve vs. Slack, 81 A. 124; Cronan vs. Exrs. of McDonogh, 9 A. 302.

(b) *Action to revoke donation.*

Thibodeaux vs. Comeau, 80 A. 1119.

Aliter in action by widow of one heir claiming usufruct of her husband's share.

Denegre vs. Denegre, 88 A. 689.

3. **Revocatory action.** Debtor as well as holder of title.

Zimmerman vs. Fitch, 28 A. 454; Troustine vs. Ware, 89 A. 989; see 26 A. 388; Miltanberger vs. Weems' Heirs, 81 A. 269; Block vs. Bordelon, 89 A. 696.

Even where debt liquidated by judgment, as fraud must be proved against debtor.

Hyde vs. Craddock, 10 R. 337; Lawrence vs. Bowman, 6 R. 21.

4. Hypothecary action. Lessor and owner necessary parties.

O'Bryan vs. McVey, 26 A. 609.

5. Suit to determine title to.

(a) A judgment. Alleged owner necessary party.

Bothick vs. Greeves, 34 A. 307.

(b) Stock illegally transferred. Stockholder in whose name it stands is necessary party.

Reid vs. Ins. Co., 32 A. 546; St. Bomes vs. Cotton Press, 20 A. 383; Id. vs. Id., 34 A. 421.

6. In injunction suits seeking to enjoin:

(a) Police Jury from employing attorney, the attorney is necessary party.

Leche vs. Police Jury, 37 A. 136.

(b) Tax Assessor or Tax Collector from levying and collecting tax to pay a creditor, creditor is necessary party.

Shields vs. Pipes, 31 A. 765.

(c) Levying of tax by Levee Board, Board is necessary party.

Gaither vs. Tax Collector, 40 A. 363. But see Cobb vs. Maguire, 36 A. 301; Enault vs. McGuire, 36 A. 304; Budd vs. Houston, 36 A. 360; Jones vs. Rains, 35 A. 393.

7. Partition suits. Co-owners are necessary parties.

Ware vs. Vignes, 35 A. 238.

And attorney for absent heirs can not represent minor heirs therein.

Savage vs. Williams, 15 A. 252.

8. Suit by surviving partner of commercial firm for appointment as liquidator. Legal representatives of deceased partner are necessary parties.

Walmsley & Patterson vs. Mendelsohn et als., 31 A. 152.

But not attaching creditor.

New Orleans vs. Gauthreaux, 32 A. 1126.

9. Rescission of contracts. All parties to the transaction must be before court.

Stockmeyer vs. Weldner, 32 A. 107.

10. Petitory action. In action to bring into succession of insolvent property seized by another creditor, the syndie and seizing creditor are necessary parties.

Bird vs. Generes, 34 A. 321.

11. Actions to fund under Acts 188 of 1880 and 67 of 1884.
Board of Liquidation is necessary party.
Fire Engine Co. vs. New Orleans, 89 A. 961.
12. All actions touching legality of proceedings of Police Jury. Jury is necessary party.
Egan vs. Russ, 89 A. 967.
13. Actions of account against common agent by one of several constituents. All constituents are necessary parties.
Board of Trustees, etc., vs. Dupuy, 81 A. 805.
14. Revival of judgment. Judgment creditor and judgment debtor, or their legal representatives.
Chapman vs. Nelson, 81 A. 841.
15. Action of nullity of sale under executory process. Adjudicatee necessary party.
Smith vs. Brady, 87 A. 122.
16. Action to annul a sale. All parties to it must be before court.
Heirs of Burney vs. Ludeling, 41 A. 627; Fickel vs. Gainault, 82 A. 92;
Succession of Elcard, 87 A. 865.
17. Possessory action. Possessor necessary party.
Succession of Elcard, 27 A. 865.
18. Actions to erase mortgages. Mortgagees are necessary parties.
Ashby vs. Ashby, 41 A. 141; State vs. Recorder, 21 A. 401.
Aliter when mortgage on its face is paid.
Erwin vs. Bank of Kentucky, 5 A. 4.
19. Distribution of insolvent's effects by tableau. Creditors must be notified.
Conrey vs. Creditors, 8 A. 571.
20. Action to rescind order accepting cession of insolvent. Ceding debtor and creditors through syndic are necessary parties.
Jeffries vs. Ironworks, 15 A. 19.
21. Suit for marital portion. Heirs, not administrator, should be cited.
Vasseur vs. Dupre, 8 A. 488.
22. Action by member for restitution to corporate rights. Corporation must be made party.
Ross vs. Crockett, 9 A. 887.
23. In executory process against one of several mortgage debtors *in solido*, others are necessary parties.
Hughes vs. Patterson, 28 A. 673.

24. Action to cancel recordation of claims to real estate.
Claimants necessary parties.

Willis vs. Wasey, 42 A. 876.

25. Action to annul order granting respite. Creditors are necessary parties.

Liquor and Tobacco Co. vs. Jeffries, 45 A. 621; Morgan vs. Creditors, 7 L. 62.

(B) Not necessary parties:

Those who have no substantial interest in the subject matter of the litigation need not be joined in the suit.

Thus the following parties are not necessary in the following actions:

1. Actions on joint obligations. All joint obligors are not necessary parties since Act 103 of 1870, page 19, Acts 1871.

Mitchell vs. D'Armond, 30 A. 896; C. C. 2065.

(a) *After* under old law and former jurisprudence.

Alling vs. Woodruff, 16 A. 6; Hincks vs. Converse, 38 A. 873.

(b) Nor are other joint obligees necessary as plaintiffs.

Hincks vs. Converse, 38 A. 873.

2. Application for appointment of liquidator to a partnership. Attaching creditor not necessary party.

City vs. Gauthreaux, 32 A. 1126.

3. Nullity of tax sale. State is not a necessary party.

Bank vs. Lannes, 30 A. 871.

4. Action by State Tax Collector to collect parish tax. Police Jury is not a necessary party.

Gonzales vs. Lindsay, 30 A. 1065.

5. Action by a special legatee against universal legatee in possession for payment of legacy. Executor not necessary party.

Pironi vs. Elley, 39 A. 802.

6. Suit by heirs of wife, not for partition of community, but for recognition of their rights in same. Co-heirs are not necessary.

Tugwell vs. Tugwell, 52 A. 848, 853.

(a) Nor in action by widow of one heir claiming usufruct of her husband's interest in estate.

Denegre vs. Denegre, 33 A. 639.

(b) Nor in action by minor heir against tutor for an account.

Skipwith vs. Glathary, 34 A. 23.

- (c) Nor in application by executor of succession in liquidation for order of sale to pay debts.

Succession of Lehman, 41 A. 968; Succession of Hood, 83 A. 46.

7. Revival of judgment. Third persons holding property affected with judicial mortgage resulting from inscription not necessary parties.

Chapman vs. Nelson, 81 A. 841.

8. Suits to reduce or annul assessments of shares of capital stock to shareholders. Corporation and not stockholders are necessary parties.

Oil Co. vs. Assessor, 41 A. 1187.

9. Suit by heirs against administrator for account. Co-heirs need not be joined.

Hickman vs. Flenniken, 12 A. 268.

10. Partition suit. Mortgage creditors not necessary parties.

Johnson vs. Brown, 18 A. 330.

11. Executory process. Holders of concurrent mortgage notes need not be made parties.

Utz vs. Utz, 84 A. 752.

12. In intervention. Intervenor need not cite defendant when no dispute between them.

Cain vs. Pullen, 84 A. 515; Gerson vs. Jamar, 80 A. 1294.

13. Action for settlement of partnership. Simulated transferee of interest need not be joined.

Janney vs. Brown, 86 A. 118.

- (C) Joinder of parties. Those who have an identity of interest should be joined either as plaintiffs or defendants.

1. Proper joinder is made.

- (a) Where joint obligees sue or joint obligors are sued, though they may sue or be sued separately.

Act No. 106 of 1870, Acts 1871, p. 18; Hincks vs. Converse, 88 A. 871; Mitchell vs. D'Armond, 80 A. 896.

- (b) Where heirs contest a will.

Bourke vs. Wilson, 88 A. 321.

- (c) Where several principals demand accounting from common agent.

Trustees, etc., vs. Dupuy, 81 A. 805.

- (d) Where dative testamentary executor joins with heirs in revoking donation *inter vivos*.

Thibodeaux vs. Comeau, 81 A. 1119.

- (e) Where widow and children of deceased sue for damages resulting from his death.

Clairain, tutrix, etc., vs. Western Union, 40 A. 179.

- (f) Where suit is brought on injunction bond against the plaintiffs in injunction, sureties on bond and the fomentor of injunction.

Riggs vs. Bell, 59 A. 1080; Conery vs. Coons, 53 A. 572.

- (g) Where two hay inspectors seek to compel the third to account for fees collected.

Clarke vs. Waters, 35 A. 451.

- (h) Where co-proprietors are sued by other co-proprietors for contribution to expense intended for benefit of all.

Huston vs. Fisk, 10 A. 769.

- (i) Where defendants in petitory action, though holding distinct lots, must all defend the common origin of their titles.

Derbes vs. Romero, 28 A. 644.

- (j) In revocatory action, several fraudulent vendees in distinct sales may be sued with debtor in one action.

Ins. Co. vs. Gerson, 58 A. 549; 59 A. 969; 58 A. 696.

- (k) Where two or more defendants are sued in tort—but where one defendant is sued in tort and other in contract, they may sever.

Hulzab vs. E. R. Co., 58 A. 187.

2. Improper joinder is made.

- (a) Where sheriff in office and his predecessor are sued *in solido* for seized property lost whilst in charge of latter.

Ins. Co. vs. Harper & Waggaman, 52 A. 1165.

- (b) Where judgment creditor, adjudicatees at two sales, and sheriffs are joined in suit to annul judgment and sales and for damages.

Cane vs. Sewall, 34 A. 1096.

- (c) Where several judgment creditors sue police jury to levy a tax to pay judgments.

Favrot vs. Baton Rouge, 50 A. 606.

- (d) When several defendants are sued, or when several plaintiffs sue, where there is no joint liability in privity of contract.

Dyas vs. Dinkgrave, 15 A. 502; Weaver vs. Armant, 14 A. 182;
Bradwell vs. Smith et als., 28 A. 172.

(D) *Who may sue.*

1. United States in State Court.

United States vs. Murdock 18 A. 305; United States vs. Smith, 7. A. 185;
81 A. 828.

2. State.

State vs. Girardey, 84 A. 620; State vs. Ober, 84 A. 360.

(a) And only State can sue to determine title to public office.

Guillotte vs. Poincy, 41 A. 385.

(b) But, unless specially authorized, the State is not represented by Levee Commissioners.

Gastel vs. McGenty, 20 A. 231.

3. State treasurer may sue on notes given for purchase price of public lands.

Hunter vs. Williams, 16 A. 130.

4. Municipal corporation.

(a) Town, through mayor and councilmen.

Opelousas vs. Andrus, 87 A. 639; Mayor and Council vs. Board of Police, 21 A. 447; Corporation vs. Clementz, 24 A. 27.

(b) And majority of council may sue.

8 M. 495; Carrollton vs. Board of Police, 21 A. 447.

(c) Parish, through Police Jury.

Barrow vs. Fisher, 30 A. 516; Police Jury vs. Brookshire, 81 A. 786;
Police Jury vs. Isabel, 40 A. 340; Police Jury vs. Mitchell, 87 A. 44.

(d) President of police jury can not, without special authority, stand in judgment.

Police Jury vs. Wise, 88 A. 704; Police Jury vs. Monroe, 88 A. 630.

5. Board of trustees.

Board of Trustees American Printing House for Blind vs. Dupuy, 81 A. 305; Congregation of Lafayette vs. Pressler, 17 A. 127; Church Wardens vs. Perohé, 86 A. 160.

6. School board.

School Directors vs. Anderson, 28 A. 739.

But board can not, without legislative authority, bring petitory action to recover land donated by Congress for school purposes.

Board vs. Ober, 32 A. 417.

7. Board of liquidation may mandamus New Orleans to turn over all property not dedicated to public use.

Board of Liquidation vs. City, 86 A. 524.

8. State treasurer, *quoad* the duties of his office.

Hunter vs. Williams, 16 A. 123.

9. Levee commissioners.

Board of Levee Commissioners vs. Lorio Bros., 33 A. 276.

10. Federal assignee in bankruptcy.

Woolbridge vs. Rickert, 33 A. 236; Claflin vs. Houseman, 93 U. S. 130.

Not after discharge.

Grayson vs. Norton, 33 A. 1012.

11. Liquidator, or corporation itself in process of liquidation.

Association vs. Lord, 35 A. 427; Southern Mutual Ins. Co. vs. Pike et al., 33 A. 523; Commercial Bank vs. Villavaso, 6 A. 542; Planters' Association vs. Claiborne, 7 A. 319; State vs. Haynes, 12 A. 265.

12. Foreign corporation.

Life Association vs. Levy, 33 A. 1203.

13. Tax collector may sue for taxes, when they can not be conveniently collected otherwise, or when a seizure will cause delay by injunction.

Reed vs. Creditors, 39 A. 115; Budd vs. Houston, 36 A. 369; but see Alexandria vs. Hyman, 35 A. 301; New Orleans vs. Wood, 37 A. 732.

14. Assignee of claim.

Bennett vs. Bank, 34 A. 154; Beaty vs. Clement, 12 A. 82; Ricard vs. Harrison, 19 A. 152; Davis vs. Benevolent Assn., 20 A. 24.

(a) Even without consideration, as debtor has no interest in contesting title of assignee.

Case vs. Receiver, 21 A. 732; Gray vs. Thomas et al., 18 A. 412.

(b) Or subrogee.

21 A. 311; Perret vs. Roussel, 19 A. 177; 12 A. 82.

15. Assignee of bail bond.

Bell vs. Keefe, 12 A. 340; 17 L. 13.

16. Syndic.

Cloutier vs. Lemee, 33 A. 305; Nouvet vs. Bollinger, 15 A. 293; Dunbar vs. Steib, 24 A. 268; Dwight vs. Simon, 4 A. 490; Keene vs. Goldsmith, 14 A. 349; Bank (in Liquidation) vs. Wilson, 19 A. 1; Davis vs. Stern, 15 A. 177; 44 A. 682, 350; 45 A. 365.

17. Receiver.

McAlpin vs. Jones, 10 A. 552; Raymond vs. Palmer, 35 A. 278.

(a) But not where appointment is null.

Turqueau vs. Brady, 24 A. 348.

(b) And appointment of receiver to solvent corporation is absolutely null.

Turqueau vs. Brady, 24 A. 348.

(c) Or to partnership.

Martin vs. Blanchin, 16 A. 237; Stark vs. Burke & Co., 5 A. 740.

(d) He may sue to enforce rights of stockholders or creditors *ut universi*, but not *ut singuli*.

Lacombe vs. Milliken, 35 A. 367; Raymond vs. Palmer, 35 A. 278.

18. District attorney.

Farrar vs. Steel, 81 A. 640.

19. Taxpayers.

(a) To contest validity of municipal ordinances and contract.

Handy vs. City of New Orleans, 39 A. 107; *Johnson vs. Tax Collector*, 89 A. 534; *Flagg vs. St. Charles*, 27 A. 819; *Taxpayers' Association vs. Conroy and City*, 33 A. 567.

(b) To abate a nuisance.

Musgrove vs. Church, 10 A. 481.

(c) To enjoin a neighbor from unduly raising the banquette.

Dudley vs. Tilton, 14 A. 263.

(d) But see, to the effect that taxpayers could not enjoin issuance of unconstitutional bonds.

Morgan vs. Graham, 1 Woods, 124.

20. Pledgee, so also pledgeor.

Ins. Co. vs. Lozano, 89 A. 321; *Chaffe & Sons vs. DuBose*, 86 A. 257; *Lafayette Bank vs. Bruff*, 83 A. 526; *Bluin vs. Liquidators*, 80 A. 714; *Ducane vs. McKenna*, 28 A. 418; 29 A. 548; *Chaffe vs. Purdy*, 48 A. 889.

And suing in individual name will not estop from showing pledge.

80 A. 714.

21. Agent, provided he disclose name of principal.

Willard vs. Lugenbuhl, 24 A. 18; *Frazier vs. Wilcox*, 4 R. 517.

Aliter, when holder of note sues.

Hunt vs. Stone, 19 A. 526.

22. Depositary. To protect deposit.

Lannes vs. Courege, 81 A. 74; *McAlpin vs. Jones*, 10 A. 552.

23. Partnership.

(a) Partner may sue for settlement.

Latling vs. Fassman, 29 A. 280.

(b) All partners are joined in suit on partnership claim.

Gallot vs. Reilly, 18 A. 260; *Dorr vs. Jonett*, 20 A. 27; *Rugely, Blair & Co. vs. Gill*, 15 A. 509; *Todd vs. Young*, 16 A. 162.

24. Sheriffs.

State ex rel. Frederick vs. Skinner, Judge, 83 A. 150; *Robins vs. Brown*, 82 A. 481; *Phelps vs. Taylor*, 23 A. 685; 83 A. 146; *Bell vs. Keefe*, 12 A. 840.

25. Curators of vacant successions.

Sullivan vs. Gradenigo, 15 A. 582; 42 A. 411.

26. Stockholders.

- (a) Shareholders may sue, in place of corporation, when officers fail to protect them. Failure and demand must be alleged and proved.

Life Association vs. Levy, 33 A. 1203; *Detroit vs. Dean*, 106 U. S. 537; *Hawkes vs. Oakland*, 104 U. S. 450; *St. John vs. E. R. Co.*, 22 Wall. 136; *Jones vs. Bolles*, 9 Wall. 364; *Knabe vs. Ternot*, 16 A. 13.

- (b) Stockholders may sue corporation and attach its property.

Life Association vs. Levy, 33 A. 1203.

27. Domestic administrators.

44 A. 907; 33 A. 1010; 36 A. 408; 24 A. 278; 28 A. 591; *Labitt vs. Perry*, 26 A. 591; *Succession of Decuir*, 26 A. 222.

- But administrator can not as administrator sue himself as individual.

Harris vs. Pickett, 37 A. 741.

28. Domestic executors.

44 A. 51.

- (a) But not after discharge.

Rost vs. Executors, 15 A. 130; *Morris vs. Collins*, 24 A. 203.

- (b) Representing testator, he can not sue where testator could not.

VanWicke vs. Calvin, 23 A. 205.

- (c) May sue for partition.

Bailey vs. Becnel, 30 A. 1032.

- (d) But, with closing of succession, functions of administrators and executors cease, and heirs then sue or are sued.

Sloan vs. Stevenson & May, 24 A. 230; *Leman vs. Truxillo*, 23 A. 63.

29. Foreign executors and administrators, who have qualified under our laws, their former capacity being restricted to the territorial limits of the State wherein they were appointed.

Succession of Taylor, 23 A. 23; *Succession of Roffignac*, 21 A. 365; *Succession of Young*, 21 A. 594; *Mason vs. Executors*, 19 A. 42; *Burbank vs. Payne & Harrison*, 17 A. 16; *Heirs of Henderson vs. Rost & Montgomery*, 15 A. 405; *Succession of Gurney*, 14 A. 633; but see *Crawford vs. Graves*, 15 A. 244.

30. Private corporations—but not in corporate capacity after decree of forfeiture.

Bank of Louisiana vs. Wilson, 19 A. 1.

31. Commissioners of Immigration. Under R. S., Sec. 1723.

Commissioners vs. Brandt, 26 A. 30; 14 A. 207.

- 32. Beneficiaries of judicial bond, even if not nominally in their favor.**

Real beneficiary of injunction bond may sue.

Pottier vs. Grant, 26 A. 288.

- 33. Suits for use of another party.**

Beany vs. R. R. Co., 40 A. 82.

- (a) A, having legal title in himself, may sue for equitable benefit of B.

Smith vs. Cordage Co., 41 A. 1, see brief; *Marbury vs. Pace*, 30 A. 1880; *Moore vs. Browder*, 18 A. 484.

- (b) *Aliter* where no such title exists and when not authorized.

Gullefont for use of, etc., vs. Ascension, 28 A. 418.

- 34. Bankrupt may sue.**

To collect assets when he has made a composition with creditors.

Henderson vs. Case, 81 A. 215; *Bayly & Pond vs. Stacy & Poland*, 30 A. 1210.

- 35. Curator.**

Dolhonde vs. Lemoine, 82 A. 251.

- 36. Police jury, in matters within their province.**

Parish of Concordia vs. N. R. R. & T. R. R. Co., 44 A. 613.

- 37. Husband sues on community claims.**

White vs. V., S. & P. R. R. Co., 42 A. 980.

- (a) Husband can not sue wife in our courts for abandonment where matrimonial domicile is in other State and abandonment occurred there.

Heath vs. Heath, 42 A. 487; 40 A. 40; 18 A. 1.

- (b) *Aliter* where domicile is here.

40 A. 459.

- 38. Attorneys, holding notes to their order as such, may sue, though one of the owners may be a foreign succession.**

Peters vs. Guano Co., 42 A. 690.

- 39. Road overseers may sue to enforce road service (Act 112 of 1880).**

Parish ex. rel. Theriot vs. Broussard, 42 A. 841, 406.

- 40. Governor, in name of State.**

State vs. City, 41 A. 156.

- 41. Corporation sues as agent of shareholders to reduce or annul assessment on shares of capital stock.**

Oil Co. vs. Assessor, 41 A. 1187.

- 42. Pastor may sue when authorized thereto by church members.**

Church vs. Ice Co., 44 A. 1024.

- 43. Board of Harbor Masters.**

Board vs. R. R. Co., 40 A. 124.

103. Race, Color, Previous Condition No Disqualification—No disqualifications to bring actions can arise on account of race, color, or previous condition.

An insane person can not sue personally or as representative.

Kerwin vs. Ins. Co., 35 A. 22.

104. No Suit by Children Against Parents—Children, as long as they are subjected to paternal power, that is to say, while their fathers and mothers are living and they not emancipated, can not bring suit against them.

105. Suits by Wife Against Husband—A married woman can not sue her husband as long as the marriage continues, except it be to obtain a separation from bed and board, or for the separation of property, or for the restitution and enjoyment of her paraphernal property, or in case she holds her property separate from him by her marriage contract, or for divorce; but in no case can she sue her husband without the authorization of the court before which she brings her action.

R. S. 517; C. C. 121, 1316; see Mrs. Smith vs. Her Husband, 42 A. 1063.

- 1. But want of authorization, if not timely objected to, will not be ground for annulling judgment against husband.**

Jumonville vs. Sharp, 27 A. 461.

- 2. Necessity of authorization by court.**

Heyob vs. Husband, 18 A. 41.

- 3. No suit by wife against husband except—**

(a) To obtain separation from bed and board or for divorce.

(b) To obtain separation of property.

(c) To obtain restitution and enjoyment of paraphernal property.

(d) *Nota*.—Wife's suit must come within one of the classes mentioned; else dismissed.

Mrs. Burdette vs. Her Husband, 18 A. 41.

(e) And she can not sue for alimony except incidentally in suit for separation from bed and board.

Mrs. Carroll vs. Her Husband, 42 A. 1071; Moore vs. Moore, 18 A. 618; Holbrook vs. Holbrook, 32 A. 18.

106. Husband's Authorization or that of Court Necessary—A married woman, whether she be of age or a minor, can not appear in court against any one without the authorization of her husband, although she may be a public merchant, carrying on her trade separate from him, unless she has obtained a separation from bed and board by virtue of a judgment duly executed, or has been regularly divorced.

C. C. 126, 125, 121, 123, 1316, 1786, 8086.

(A) *Authorization of husband or of court necessary.*

1. To bring suit or stand in judgment even when wife is a public merchant.

C. C. 121; Bills vs. Hamilton, 15 A. 182; Schewer vs. Klein, 15 A. 808; Adle vs. Anty, 5 A. 681.

2. To answer as garnishee.

Delacroix vs. Hart, 24 A. 192.

3. To take appeal when not previously authorized.

Bray vs. Bynum, 2 A. 879; Fairrex vs. Biers, 37 A. 681; Gibson vs. Hitchcock, 35 A. 1201.

Aliter, when previously authorized.

DeBlanc vs. Levasseur, 26 A. 541.

(B) *No authorization necessary.*

1. After separation from bed and board or divorce.

2. In suits against wife on mortgage of paraphernal property executed with authorization of husband.

Stewart vs. Boyle, 23 A. 88; Dobard vs. Thibaut, 34 An. 1196.

(C) *Evidence of proper authorization by husband.*

1. Acceptance of service of petition, without objection.

Spivey vs. Willson, 31 A. 658.

2. Active participation in the suit.

Jordan vs. Anderson, 29 A. 749; Mrs. Fairrex vs. Bier, 37 A. 821.

3. Joining wife as co-plaintiff.

Mrs. Evans vs. Mrs. DeL'Isle, 24 A. 248; Succession of Payne, 26 A. 202.

4. Signing of injunction bond.

Lewis vs. Winston, 26 A. 707.

5. Citation to husband and appearance as defendants.

Riley vs. Riley, 27 A. 248; Zuberbier & Behan vs. Prudhomme, 84A. 1048.

6. Appearance through properly authorized agents.

Succession of Bougere, 28 A. 748.

7. When given at any time before trial on merits.

Succession of McDonald, 26 A. 609; Succession of Pomeroy, 21 A. 576.

8. Hence signing of appeal bond not sufficient.

Tutorship of Stokes, 22 A. 204.

(D) Insufficient evidence of authorization.

1. Unverified statement in pleading of wife.

Succession of Hatcher, 28 A. 186; Succession of Pomeroy, 21 A. 576;
Somers vs. Schmidt, 25 A. 198.

2. Mere signing of appeal bond.

Tutorship of Stokes, 22 A. 204.

3. Court's authorization is invalid when husband is not absent and has not refused to authorize.

Delacroix vs. Hart, 24 A. 141; Saunders vs. Burns, 38 A. 399.

4. But refusal presumed when wife brings suit without his authorization.

Jamison vs. Barrow, 24 A. 171.

5. Want of authorization is special plea in lower court.

Taylor vs. Littell, 21 A. 665; Cochrane vs. Miller, 10 A. 140; Durham vs. Dougherty, 30 A. 1055.

6. Unauthorized answer has no legal effect.

White vs. Bird, 20 A. 281.

107. Suits by Wife Alone—Husband Sues, When—Husbands have under their control the personal and possessory actions to which their wives are entitled, though they be themselves minors; therefore they can proceed judicially, and in their own name, in whatever relates to the preservation of the dotal property which their wives have brought to them by marriage, as well as to the recovering of the debts due them, these being under their administration.

But actions relating to the ownership of the dotal or paraphernal property of the wife, or of some real right belonging to her, must be brought by the wife, duly authorized by her husband, or by the judge if he fails to do it.

C. C. 128, 875; C. P. 110.

(A) Personal action of wife under exclusive control of husband: Hence she can not sue when not separated in property.

1. To recover damages for personal injury, to reputation, credit, etc.

Holmes vs. Holmes, 9 L. 850; Ford vs. Brooks, 85 A. 159; Cooper vs. Cappel, 29 A. 218.

2. *Aliter*, when husband is a party.

Cade vs. Reddit, 15 A. 492.

3. And the wife may be joined.

Barton vs. Kavanaugh, 12 A. 882.

4. *Aliter*, in action for damages to paraphernal property separately administered by wife.

Ford vs. Brooks, 89 A. 159.

5. Or on note given for dowry.

Lapice vs. Lapice, 21 A. 226.

6. Wife alone may enjoin seizure of her paraphernal property,

Peoquet vs. Peoquet, 17 A. 204; Barns vs. Bidwell, 28 A. 296.

7. And husband, administering his wife's paraphernal property, may sue on note given for land.

Morton vs. Copeland, 25 A. 592; Lapice vs. Lapice, 21 A. 228.

(B) Husband sues as head of community.

Pontz vs. Bistes, 15 A. 686.

(C) And is sued alone for its debts.

Bienvenu vs. Fournet, 28 A. 623.

108. Suits for Minors, Persons Interdicted, Absentees—Minors, persons interdicted or absent, can not sue, except through the intervention or with the assistance of their tutors or curators.

1. Minor may sue, if assisted by tutor.

Dugas vs. Guilbeau, 15 A. 581.

2. Tutor may act alone; judgment for or against him *eo nomine* is a judgment for or against the minor.

Martel, Tutor, vs. Richard, 15 A. 596; McWilliams vs. McWilliams, 15 A. 88; Frazer vs. Zyllicz, 29 A. 535; McEnery vs. Letchford, 23 A. 617.

3. Under-tutor represents minor as against tutor, but not against third persons.

Nettes vs. Hermann, 26 A. 458; Ashby vs. Ashby, 41 A. 129; Emmer vs. Kelly, 23 A. 763; Peyroux vs. Peyroux, 24 A. 176.

4. Mere relatives can not sue in name of minor.

10 L. 82.

5. Special tutors need not be appointed to represent minors in succession sale.

Peyroux vs. Peyroux, 24 A. 176.

But may be appointed in all emergencies requiring it.

In re Minor Fortier, 31 A. 50.

6. Foreign tutors must qualify under our laws.

Succession of Young, 21 A. 394.

7. Special tutor's appointment not vitiated because he is also styled curator *ad hoc*.

Keenan vs. Ahern, 34 A. 885; Succession of Sadler vs. Henderson, 35 A. 827.

109. Suits by Tutors, Curators—Tutors act themselves, in all judicial proceedings, in the name of their minors, and in all suits which may be brought for them, without making them parties to said suits.

The curators of persons, interdicted, or absent, act judicially in the name of those they represent, in the same manner as tutors of minors.

1. Minor may be joined with tutor.

Dugas vs. Gullbeau, 15 A. 581.

2. But not necessarily.

Martel vs. Richard, 15 A. 593.

3. Minor coming of age pending suit may prosecute same with change of pleadings and without new citation.

Id.

4. Non-resident father, as guardian or tutor to his children, may sue in this State.

James vs. Mayer, 41 A. 1101.

110. Minor Husband—The minor husband emancipated by marriage can bring suit without the assistance of any curator.

7 L. 560.

111. Curators—The curators of vacant successions, or of absent heirs, may bring all kinds of actions relating to their administration in their own name and in their quality, without being obliged to mention the name of the heirs they represent, because it is often uncertain whether such heirs exist, and their names are generally unknown.

Succession of Johnson, 1 A. 75.

Curator may accept, sue for and recover legacy fallen to absentee.

Dolhonde vs. Lemoine, 52 A. 251.

112. Corporations—Bodies corporate and chartered institutions act judicially through their proper representatives under the name or title given to them in the act of incorporation.

(A) Corporate bodies may sue whether—

1. Foreign.

Life Assn. vs. Levy, 33 A. 1205; Planters' Bank vs. Bass, 2 A. 481.

2. Or domestic.

Association vs. Lord, 35 A. 427; Workingmen's Bank vs. Converse, 29 A. 369; 17 A. 127.

(B) But bodies not corporate can not sue as corporations.

Congregation of Mount Carmel vs. Farrelly, 34 A. 584; Workingmen's Bank vs. Converse, 29 A. 369.

(C) Members may sue as individuals.

African Church vs. New Orleans, 15 A. 441.

But not for company.

Knabe vs. Ternot, 16 A. 15; Soller vs. Mouton, 3 A. 541.

(D) Who sues in name of corporation.

1. Usually the president, which fact, if not stated in petition, may be shown on trial of exception referred to merits.

Ins. Oil Tank Co. vs. Scott, 33 A. 350.

2. Liquidators.

Association vs. Lord, 35 A. 427; Commercial Bank vs. Villavaso, 5 A. 542.

3. Stockholders, in extreme cases, as where corporate officers, called upon to sue, fail in their duty, which must be alleged and proved.

Morgan vs. R. R. Co., 1 Woods, 18; *Memphis vs. Dean*, 8 Wall. 72.

- (E) *An organized department (i. e. medical department of Tulane University) may sue or be sued.*

Mrs. Stone vs. Medical Faculty, 28 A. 104.

- (F) *Corporation can not sue in corporate name after decree of forfeiture.*

Bank in Liquidation vs. Wilson, 19 A. 1; *Commissioners vs. Landis*, 12 R. 634.

113. Suits by Heirs—As the right of action may be transmitted, it passes to the heirs; therefore the heirs of the deceased may sue the debtor of the succession in the same manner as the deceased himself could have done.

But, actions being divisible, if there be several heirs, each may sue for his separate share in the same manner, as each is only bound, *pro rata*, of his share for the debts of the succession.

Actions for damages for tort do not perish with party; they pass to heirs.

Vincent vs. Sharp, 9 A. 463; Act 71 of 1894.

CHAPTER VI.

AGAINST WHOM ACTIONS MAY BE BROUGHT.

Who may be sued. In general.

1. Alien, when properly cited.

Weber, vs. Duroc, 15 A. 63.

Even alien enemy.

Window vs. McVeigh, 63 U. S. 298; *Pasteur vs. Lewis*, 39 A. 5; *McVeigh vs. United States*, 11 Wall. 267.

2. State may be sued when consent given.

State ex rel. N. Y. Guaranty Co. vs. Jumel, 28 A. 287; *State ex rel. Hart vs. Burke*, 33 A. 449; 107 U. S. 712; 114 U. S. 332.

- (a) Giving of consent not admission of liability.

34 A. 541; *Hart vs. Burke*, 33 A. 433.

- (b) But State officers may be sued for performance of ministerial duties.

State ex rel. Newman vs. Burke, 85 A. 185; State ex rel. Lee & Co. vs. Jumel, 85 A. 981; Administrators of University vs. Burke, 85 A. 457.

- (c) And suit to annul tax collector's adjudication to the State is not technically a suit against the State.

Budd vs. Tax Collector, 86 A. 961; Denegre vs. Gerao, 85 A. 958; Oil Works praying for monition, 84 A. 265.

3. Levee Commissioners.

Selby vs. Commissioner, 14 A. 485.

4. Assignee in bankruptcy.

Stockhouse vs. Zuntz, 86 A. 529; Alter vs. Nelson, 27 A. 242.

5. Police jury for parish.

Young vs. Police Jury, 82 A. 392; 89 A. 759.

6. Board of Liquidation, touching its specific duties.

Board of Supervisors vs. Board of Liquidation, 80 A. 816; Bank vs. Board of Liquidation, 80 A. 1856; Bartlette vs. Board of Liquidation, 81 A. 278; State ex rel. Meyers vs. Board of Liquidation, 88 A. 124.

114. Suits Against Minor Husbands—Civil actions may be brought against minor husbands, emancipated by marriage.

115. Actions Against Tutors or Curators—Actions against interdicted persons or minors must be brought directly against the tutor of the minor or the curator of the interdicted person.

C. P. 110, 194, 787, 963, 964.

1. Minor may be joined with tutor.

Dugas vs. Gilbeau, 15 A. 581.

2. Judgment against tutor conclusive on minor in absence of fraud.

Martel vs. Richard, 15 A. 598; 14 A. 578; 12 A. 850; McWilliams vs. McWilliams, 15 A. 86; Heroman vs. La. Ins. Deaf and Dumb, 84 A. 805.

3. No tutor or tutrix represents minor until after confirmation and oath.

Petrie vs. Wofford, 8 A. 562.

4. When tutor and minors have left State, courts have no jurisdiction to remove him and appoint another.

Succession of Cass, 42 A. 381.

116. Curator ad hoc of Unrepresented Minor or Absentee—If the minor, against whom one intends to institute a suit, has no tutor, the plaintiff must demand that a curator *ad hoc* be named to defend the suit. The same course must be pursued if the person intended to be sued be absent and not represented in the State, *et*

C. C. 56, 145, 157, 818, 8556; C. P. 109, 136, 737, 964.

(A) Special Tutor or Tutor ad hoc.

1. Appointment proper when no tutor represents minor.

Norman vs. Barbin, 18 A. 611; Succession of Sadler vs. Henderson, 85 A. 626; Keenan vs. Ahern, 84 A. 695; Savage vs. Williams, 15 A. 261; Petrie vs. Wofford, 8 A. 562.

2. Curator or tutor *ad hoc* represents minor in partition.

Hooke vs. Hooke, 6 L. 472; Covas vs. Bertoulin, 44 A. 683; C. P. 964.

(B) When proceedings are in rem, and not purely in personam, absent and unrepresented defendant may be cited through curator ad hoc.

Thus:

1. In suits for dissolution of sale of immovable property coupled with demand for possession.

McKenzie vs. Bacon, 38 A. 764; Robbins vs. Martin, 48 A. 489.

2. For removal of apparent incumbrances on real estate.

Pasley vs. McConnell, 88 A. 475.

3. For nullity of donation of real property.

Wunstel vs. Landry, 89 A. 812.

4. For subjection to seizure of property in which absentee is interested.

Adler, Goldman & Siegel, vs. Wolff, 86 A. 170.

5. For enforcement of mortgage and vendor's privilege.

Bartlette vs. Wheeler, 81 A. 540.

6. For enforcement of paying claim on property.

O'Hara vs. Booth & Connell, 29 A. 817.

7. For partition of real estate.

Morris vs. Bienvenu, 80 A. 879.

Even when absent minors are defendants.

Randolph vs. Chapman, 21 A. 486; Buddecke vs. Buddecke, 21 A. 574.

8. For revival of judgment.

Bertron vs. Stuart & Powell, 48 A. 1171.

in partition or expropriation suits, if it be made to appear by affidavit that the residence of defendant is unknown to plaintiff. Affn July 24th 04 Jan 1904, 724.

9. For determining interest in or validity of—

(a) A judicial mortgage.

Duruty vs. Musachia, 42 A. 837.

(b) A judgment of a court of this State.

Young vs. Upshur, 42 A. 867.

10. For specific performance of agreement to exchange real estate.

Mason vs. Benedict, 43 A. 897.

11. For divorce *a vinculo matrimonii*.

Butler vs. Washington, 45 A. 281; Mack vs. Handy, 89 A. 491; Lachand vs. Wife, 10 A. 156; Prindle vs. Williams, 9 A. 84.

But not where husband abandons domicile and comes here and sues his absent wife.

Champon vs. Champon, 40 A. 28.

12. For determination of interest of heirs in estate of deceased who died leaving property in the parish.

McGehee vs. McGehee, 41 A. 661.

(C) *Curator ad hoc to unrepresented absentee.*

1. Who is absentee:

(a) A person who has resided in the State and has departed, leaving no one to represent him.

Bartlette vs. Wheeler, 81 A. 542; Samory vs. Montgomery, 19 A. 333.

(b) A citizen of another State, though he have dwelling here and reside in it for some months during the year.

Morris vs. Bienvenu, 80 A. 878; State vs. Judge, 16 A. 890.

2. Who is not absentee:

(a) A resident in the State.

Emmerling vs. Cucullu, 18 A. 696.

(b) Party temporarily absent, but having dwelling in this State.

State vs. Judge, 16 A. 890.

(D) *Curator should be appointed:*

To absconding debtor where property has been seized.

Adler, Goldman & Siegel vs. Wolff, 86 A. 170.

(E) *Curator should not be appointed:*

In a suit for interdiction, in which service must be made on person alleged to be insane.

Gernon vs. Harrell, 28 A. 27; Hansell vs. Hansell, 44 A. 548; Dumas' case, 82 A. 679.

(F) When absentee has agent.

If there be doubt of his power to stand in judgment, safer practice is to appoint curator and compel agent to intervene.

Taylor vs. Graham, 18 A. 656; Penn vs. Evans, 28 A. 577.

(G) Unrepresented absentee can not be validly brought into court by curator ad hoc without attachment of his property or some other proceeding in rem.

Hobson vs. Peake, 44 A. 883, 886; Bogay vs. Gaillard, 25 A. 805; Dupuy vs. Hunt, 2 A. 562; Hedrick vs. Banister, 10 A. 209; Laughlin vs. Ice Company, 85 A. 1184; Pennoyer vs. Neff, 95 U. S. 714; Harkness vs. Hyde, 98 U. S. 478; Brooklyn vs. Ins. Co., 99 U. S. 862; Bracy vs. Calderwood, 86 A. 796.

Following cases under old jurisprudence reversed:

O'Hara vs. Booth & Connell, 29 A. 821; Field vs. Delta Newspaper Co., 19 A. 86; Hyde vs. Marcy, 22 A. 884; Penn vs. Evans, 28 A. 577.

(H) Curator ad hoc in divorce cases: Appointment valid only in two cases.

1. Where defendant is charged with commission of infamous crime and being fugitive from justice.

Prindle vs. Williams, 9 A. 84.

2. Where defendant charged with abandonment.

Muller vs. Helton, 18 A. 1; Campon vs. Campon, 40 A. 81; Lachand vs. Wife, 10 A. 156.

(I) Right of appointment not limited to any particular class of actions.

Beaumont vs. Covington, 6 R. 191.

(K) What court appoints.

1. Court within whose jurisdiction absentee has property.

O'Hara vs. Connell, 29 A. 821.

2. Court in which suit is brought.

Bussy & Co. vs. Nelson, 80 A. 25.

3. New order appointing may be made by competent judge.

Cavaroc vs. Fournet, 28 A. 587.

4. Curator acts only in court appointing him.

Harrod vs. Norris, 10 Martin, 18.

And only in suit in which he is appointed.

Thayer vs. Tudor, 2 A. 1010.

(L) Who may be curator.

Attorney who represents another heir in settlement of succession.

Fly vs. Noble, 87 A. 687.

(M) Powers of curator.

1. He can:

Accept service of petition and citation.

Fly vs. Noble, 87 A. 671; *Millaudon vs. Breasley*, 2 A. 316.

2. He can not:

(a) Waive service of citation.

Hill vs. Barlow, 6 R. 142; *Tieknor vs. Calhoun*, 28 A. 258; *Cormier vs. DeValcourt*, 88 A. 1168.

(b) File valid answer until cited.

Cormier vs. DeValcourt, 88 A. 1168; *Galoche vs. Grivot*, 18 A. 481; *Cavaroc vs. Fournet*, 28 A. 587.

(c) Abandon appeal or any other right.

Bienvenu vs. Insurance Company, 88 A. 209; *Carpenter vs. Beatty*, 12 R. 540.

(N) Fee of curator.

In attachment, fee fixed by law; otherwise fixed by court contradictorily.

State ex rel. Board, etc., vs. Judge, 80 A. 1026; *Bowie vs. Davis*, 88 A. 849.

(O) Scope of judgment against absentee.

It affects only property attached.

Herbert vs. Abbott, 89 A. 1112; *George vs. LeGrand*, 8 A. 652; *Johnson vs. McRae*, 8 A. 801; *Page vs. Genereux*, 6 A. 549; *Pagett vs. Curtis*, 15 A. 481; *O'Hara vs. Booth & Connell*, 29 A. 521.

(P) Evidence to justify appointment.

No affidavit of absence absolutely required.

Frost vs. McLeod, 19 A. 80; *Monition of Hall*, 21 A. 692.

(Q) Oath.

1. Curator ad hoc need not take.

Thayer vs. Tudor, 2 A. 1010; *Succession of Sadler vs. Henderson*, 85 A. 826.

2. Tutor ad hoc must take oath.

Killelea vs. Barrett, 87 A. 868.

(R) Citation to curator ad hoc.

1. Not necessarily eo nomine when petition and order show capacity.

Zuberbier & Behan vs. Prudhomme, 84 A. 1049. But see *Galoche vs. Grivot*, 18 A. 481.

2. Citation should be addressed to curator as such.

Monition of Hall, 21 A. 696; 18 A. 405.

(S) Time of appointment.

Before or after citation.

Gillis & Ferguson vs. Cuny, 21 A. 462.

117-118 AGAINST WHOM ACTIONS MAY BE BROUGHT.

(T) *When curator must be an attorney.*

In executory process under C. P. 737.

Monition of Hall, 21 A. 683.

(U) *No distinction between curator ad hoc and attorney ad hoc.*

Bienvenu vs. Insurance Co., 33 A. 209.

(V) *Curator ad hoc to absent plaintiff.*

1. Absent plaintiff not liable in damages for illegal suing out of conservatory writs by curator ad hoc.

Cobb vs. Richardson, 30 A. 1231; Petrie vs. Wofford, 8 A. 562.

2. Power of court to appoint.

See 30 A. 27.

117. Under-Tutor as Defendant—When the tutor of a minor has interests opposed to those of his ward, he can not sue him except by making the under-tutor defendant in the cause.

See Urquhart vs. Scott, 12 A. 674; Porche vs. Ledoux, 12 A. 350.

118. Suits Against Wife—When one intends to sue a married woman for a cause of action relative to her own separate interest, the suit must be brought both against her and her husband.

Should her husband be absent, the plaintiff must demand that she be authorized by the judge before whom the suit is brought to defend it alone.

Nevertheless, if she be divorced or separated from her husband, from bed and board, by a judgment duly executed, she may be sued alone without the authorization of her husband or of the judge being required.

See C. P. 106 and Annotations; C. P. 182; C. C. 123.

(A) *Wife may be sued alone without joinder or authorization of husband in the following cases.*

1. In suits for collection of public revenues.

Roberts vs. Zansler, 34 A. 208; Mrs. Laverne vs. Olty, 28 A. 677.

2. In suits on mortgage of paraphernal property executed with authorization of husband.

Stewart vs. Boyle, 23 A. 88; Dobard vs. Thibaut, 34 A. 1193.

(B) Where husband is necessary party, he must have notice of all proceedings.

1. Thus he must:

(a) Join his wife on appeal.

Bray vs. Bynum, 2 A. 879; Gibson vs. Hitchcock, 88 A. 1201.

(b) Be cited on appeal.

Lawrence vs. Burns, 12 A. 844.

2. When husband must be a party, no judgment against wife until she has been authorized by court or her husband.

Delacroix vs. Hart, 28 A. 192.

(C) Authorization of husband.

1. Necessity of:

Delacroix vs. Hart, 28 A. 192; Blake vs. Nelson, 29 A. 251; Washington vs. Hackett, 19 A. 146.

Even when wife is public merchant.

Bills vs. Hamilton, 15 A. 182; Schewer vs. Klein, 15 A. 808; Adie vs. Anty, 5 A. 631; Hedrick vs. Banister, 10 A. 208.

2. Presumption of:

(a) When he has been cited and default is taken.

Gilmore vs. Gilmore, 9 A. 197; Zuberbler & Behan vs. Frudhomme, 84 A. 1049; Monition of Hall, 21 A. 692; Hall vs. Carroll, 10 A. 412.

(b) When wife appears as plaintiff joining husband.

Gilmore case, 9 A. 197; Succession of Payne, 25 A. 202; Evans vs. DeL'Isle, 24 A. 248; but see Succession of Pomeroy, 21 A. 578.

(c) Appearance in suit and active assistance to wife.

Jordan vs. Anderson, 29 A. 749; Fairrex vs. Bier, 87 A. 821.

(d) Acceptance of service of petition.

Spivey vs. Willson, 31 A. 658.

(D) Authorization by court.

1. Necessity. Indispensable where husband refuses.

24 A. 172.

2. Validity. Not valid where husband does not refuse and is not absent.

Delacroix vs. Hart, 24 A. 141. Saunders vs. Burns, 88 A. 869.

(E) Refusal of husband presumed.

Presumed refusal of husband results where wife appears without his authorization.

Jamieson vs. Barrow, 24 A. 172.

119. Suits Against Corporations—Suits against corporations, corporate bodies, or chartered companies, must be brought against them under their legal titles.

C. P. 112, 198.

An organized department of a university may be sued.

Stone vs. Medical Faculty, 28 A. 104.

120. Making Heirs Parties—If one against whom there was a cause of action die, leaving one heir only, the suit shall be carried on against such heir as it would have been against the deceased.

If the suit had already been brought against the deceased, and he had not answered, it shall not be interrupted, but shall be continued against the heir by a mere citation or notice, served on him to that effect, within the delay for original citations, according as the distance may be from his domicile to the court where the action has been brought. If, on the contrary, the deceased have two or more heirs, the plaintiff may proceed personally against each of them for the share which he inherits, if that share be sufficiently known and ascertained by an inventory or partition; otherwise they can only be sued, each for a virile portion, that is to say, for an equal part of the debt, dividing it into as many parts as there are heirs.

If the suit had been already commenced against the deceased, it shall be continued against his several heirs by citing each of them separately as if there was only one, but judgment can only be given personally against each for his hereditary share, or virile portion, as above provided.

Suits Against Curators and Other Administrators—All suits brought against curators and other administrators, during the time of their administration, shall, after the expiration of their time, and even after they have rendered their accounts to the heirs, be continued and tried

without any additional formality, except that of making the heirs parties, which shall be ordered by the court on motion of any one of the parties, or on application of such heirs themselves.

See *Burbridge vs. Chinn*, 84 A. 681; R. S. 1104, 1462, 8694; C. P. 21, 861, 118; C. O. 1000, 1426, 1427.

1. No judgment against dead man *eo nomine*.

Succession of Pickett vs. Pickett, 41 A. 882; *Stackhouse vs. Zuntz*, 41 A. 416-418; *Montgomery vs. Sawyer*, 100 U. S. 571; *Myers vs. Brigham*, 88 A. 1015; *Surgi vs. Colmer*, 22 A. 23; *Railroad Company vs. Bosworth*, 8 A. 80; *Norton vs. Jamison*, 28 A. 102.

2. Will be remanded to have parties made.

Bates vs. Weathersby, 2 A. 484.

3. No curator *ad hoc* appointed to represent plaintiff.

Bussy & Co. vs. Nelson, 80 A. 27; but see 80 A. 1231; 8 A. 562.

4. Deceased defendant's heirs must be made parties in the court where suit was filed.

Bussy & Co. vs. Nelson, 80 A. 27.

5. There is no necessity for answer or default by and against legal representatives where deceased had answered.

McCloskey, Bigley & Co. vs. Wingfield & Bridges, 82 A. 44; *Bedford vs. Shelton*, 18 A. 40.

Aliter where no answer has been filed.

Bank vs. Choppin, 44 A. 170.

6. Administrator will not be appointed until proceedings putting heirs in possession are rescinded.

Beauregard vs. Lampton, 88 A. 827.

7. Service of citation alone on heirs or administrator without petition sufficient.

Howard vs. Copley, 10 A. 505; *Smith vs. Nicholson*, 6 A. 705.

8. After dissolution of corporation liquidators or commissioners or stockholders should be made parties.

Musson vs. Richardson, 11 R. 87.

121. Hypothecary Action Against Heir—The hypothecary creditors of a person deceased have, besides their action against each of his heirs, as provided in the preceding article, an hypothecary action against such of the heirs who have possession of some property subject to their hypothecation.

This action lies for the whole amount of the debt, whether the heir thus sued possesses the whole or only a part of the hypothecated property; he has, however, his recourse against his co-heirs for the share which they are bound to contribute towards the payment of the debt.

The heir against whom the hypothecary action is instituted, may be discharged by relinquishing such hypothecated property as may have fallen to his share, if there has been a partition, or his undivided share of such property, if the property has not been divided.

Some Heirs Present or Represented—But this relinquishment shall not free the heir from his liability to the personal action in case the creditor should prefer to proceed against him directly rather than to resort to the hypothecary action, or in case the proceeds of the sale of the hypothecated property should be insufficient to discharge the debt.

C. P. 65, 66, 67.

122. Suits Against Curators of Vacant Estates—All kinds of actions may be brought against vacant successions, when all the heirs are absent and not represented in the State, provided they be instituted against the curator appointed to administer the succession.

The judgments rendered against the curator are as valid and efficacious as if they had been rendered against the heirs themselves.

But if some of the heirs of the deceased are present or represented in the State, the suit must be brought against the heirs present or represented as well as against the curator of those who are absent.

C. P. 111; C. C. 1155; 51.

Suit to revive a judgment against deceased defendant may be brought against legal representative, whether executor, administrator, curator or heir.

Beal vs. Succession of Elder, 34 A. 1099; West vs. Davis, 34 A. 353.

123. Suits Against Testamentary Executors Alone or with Heirs—Testamentary executors may appear, and defend all the actions brought against the succession they administer, when none of the heirs are present or represented in the State; but if all the heirs, or any one of them, be present or represented, none but personal actions can be brought against the testamentary executor alone. All real actions, such as those of revendication, and the like, must be brought both against the testamentary executor and the heirs present or represented.

C. C. 1282, 1523, 1676, 1113; C. P. 44, 111; see *Bird vs. Generes*, 30 A. 576.

(A) Testamentary executors may sue.

To preserve property in any parish.

Coleman vs. Baker, 24 A. 524.

(B) Executor must join heirs in all suits.

1. To recover property standing in another's name under simulation.

Gulibeau vs. Thibodeaux, 30 A. 1099.

2. Real action.

Cronan vs. Executors, 9 A. 302; *Bird vs. Generes*, 34 A. 522.

(C) Art. 123 applies to executors alone. Administrators may sue or be sued alone in all species of actions.

Woodward vs. Thomas, 38 A. 239.

But see *contra*.

LeDoux vs. Burton, 30 A. 576.

(D) Heirs sue alone where executor is *functus officio*.

Giddens vs. Mobley, 37 A. 417.

(E) Heirs should be made parties.

With administrator when he—

(a) Is sued to recover movable property in his possession.

Scott vs. Key, 9 A. 213.

(b) Sues to set aside sale by decedent on ground of simulation.

Succession of Weigle, 18 A. 49.

(F) Heirs need not be joined.

In suit by widow of one heir claiming usufruct.

Denegre vs. Denegre, 33 A. 669.

(G) Word "heir" here means heir of the blood—legal heirs but not universal successors of deceased.

Smith vs. Sinnot, 44 A. 53.

(H) Suit against the State.

1. State can not be sued without her consent.

Louisiana vs. Jumel, 107 U. S. 712.

2. State is not sued in.

(a) Mandamus on State Treasurer to pay warrants.

State ex rel. Newman, vs. Burke, 35 A. 185.

(b) Injunction against Treasurer to prevent diverting of funds.

Osborne vs. Bank of U. S., 9 Wheat. 738-842; Davis vs. Gray, 16 Wall. 208.

(c) Mandamus to Register of Land Office.

State ex rel. McEnery vs. Nicholls, 42 A. 209.

(d) Suit to annul tax title or reduce assessment.

Palmer vs. Board of Assessors, 43 A. 1122; Bank vs. Lannes, 80 A. 871.

(e) Suits against Board of Liquidation to enforce specific, ministerial duties by it.

See Post "Mandamus."

PART II.

CONTAINING RULES TO BE OBSERVED IN THE PROSECUTION OF CIVIL ACTIONS.

TITLE I.

PROCEEDINGS TO BE OBSERVED IN THE PROSECUTION OF ACTIONS BEFORE COURTS OF ORIGINAL JURISDICTION.

124. Rules in this Title Apply to District Courts Only—The rules of proceedings, contained in the present title, relate only to the district and parish courts of the State, when in the exercise of their ordinary jurisdiction.

Special rules are hereafter established for courts of probate and justices of the peace.

C. P. 921, 1061; see State ex rel. Northeastern R. R. Co. 72. Justice, 39 A. 990.

CHAPTER I.

OF COURTS OF ORIGINAL JURISDICTION AND THEIR POWERS.

125. Territorial Limits—The limits of the territorial jurisdiction of the several district and parish courts in this State are established by special statutes.

126. Jurisdiction of Old District Courts—The original jurisdiction of the district courts extends to all civil cases, when the amount in dispute exceeds five hundred dollars,

exclusive of interest; and appellate jurisdiction in civil ordinary suits, when the amount in dispute exceeds one hundred dollars, exclusive of interest. In the parish of Orleans the district courts have the following jurisdiction:

The First, exclusive criminal jurisdiction; the Second, exclusive probate jurisdiction; the Third, exclusive jurisdiction of appeals from the justices of the peace, and to restrain and enjoin seizures made under orders issued by justices of the peace for said parish, whether the same be made under *mesne* process or execution, when the value of the property seized exceeds one hundred dollars. It has equal and concurrent jurisdiction with the Fourth, Fifth, Sixth and Seventh District Courts of the parish of Orleans in all suits, matters and proceedings, in which a judgment in money is not demanded, and to try all cases of interdiction, and suits for separation from bed and board or divorce, and act in cases of emancipation of minors, when it has jurisdiction of the person. The Fourth, Fifth, Sixth and Seventh District Courts have exclusive jurisdiction in all civil cases, except probate, when the sum in contest is above one hundred dollars, exclusive of interest; and concurrent jurisdiction with the Third District Court, in all cases of interdiction, and suits for separation from bed and board or divorce, and act in cases of emancipation of minors, when they have jurisdiction of the person.

The judgments of district courts are final in all causes on appeal from the parish courts. In all causes of which they have original jurisdiction an appeal lies from their judgment. In the parish of Orleans the judgments of the district courts are final in all causes, where the sum in dispute does not exceed five hundred dollars.

An appeal lies directly to the Supreme Court in all cases in which the constitutionality or legality of any tax, toll or impost of any kind or nature whatsoever, or any fine, forfeiture or penalty, imposed by a municipal corporation,

shall be in contestation, whatever may be the amount thereof.

Conflict of Privilege Resulting from Writs in Several Suits—Whenever a conflict of privileges arises between different creditors, all the suits and claims shall be transferred to the court, by whose mandate the property on which the privilege or right of mortgage is to be exercised, was first served on *mesne* process, or definitive execution; and said court shall proceed to class said privileges and rights of mortgage according to their rank and dignity, in a summary manner, after notifying all parties interested.

The district judges of the several districts shall, in the absence of the parish judges from their respective parishes, or where the parish judge is interested, or from any cause can not act, grant all orders of any kind in the parish court, which might be granted by the parish judge if not absent or recused, which absence or recusation must be made to appear by the affidavit of the party, or his attorney, who applies for such order.

R. S. 2908; C. O. 127; C. P. 130, 922, 924, 933, 208.

1. As to jurisdiction of old courts before Constitution of 1879 went into effect.

See Succession of Heavila, 28 A. 779; Daigle vs. Lirette, 28 A. 84; State ex rel. Pontchartrain R. R. Co. vs. Judge, 22 A. 565; Lord Oceli vs. Board of Liquidation, 30 A. 83; Sexton vs. Sullivan, 30 A. 342; Decklar vs. Frankenberger, 30 A. 410; 42 A. 111.

2. Accrued interest before suing considered in determining jurisdictional amount.

Bloom vs. Kern, 30 A. 1263; Aliter under Constitution, 1879.

3. Civil District Court and district courts in parishes have jurisdiction for interdiction of habitual drunkard.

Act 100 of 1880.

4. Magistrate courts have power to enforce road duty (Act 112 of 1880).

5. Courts have no jurisdiction to determine election contests unless expressly granted by law. Hence no jurisdiction to determine contest for parish seat.

State vs. Judge, 18 A. 89; State ex rel. Woodruff vs. Police Jury, 41 A. 849; Bonner vs. Lynch, 25 A. 267; Construction Co. vs. Police Jury, 44 A. 868.

6. First court acquiring possession.

In attachments, first court seizing acquires jurisdiction over property.

Kahn & Bigart vs. Sipill, 35 A. 1041.

7. District courts as courts of general jurisdiction have jurisdiction where valuable rights not susceptible of pecuniary valuation, such as right to vote, are involved.

Mayor and Council of Donaldsonville vs. Judge, 35 A. 637.

8. Or where claim is made for public records.

State ex rel. Garland vs. Theard, 45 A. —.

127. Parish Courts—The parish courts have exclusive, original jurisdiction in ordinary suits, in all cases when the amount in dispute exceeds one hundred dollars and does not exceed five hundred dollars; subject to an appeal to the District Court in all cases where the amount in contestation exceeds one hundred dollars, exclusive of interest.

In all probate matters, when the amount in dispute shall exceed five hundred dollars, exclusive of interest, the appeal shall be directly from the parish to the Supreme Court.

The parish courts throughout the State, except the parish of Orleans, shall have exclusive jurisdiction in all cases of adoption of children.

They have concurrent jurisdiction with justices of the peace, in all cases when the amount in controversy is more than twenty-five dollars, exclusive of interest.

All successions shall be opened and settled in the parish courts, and all suits, in which a succession is either plaintiff or defendant, shall be brought in the parish courts when the amount involved does not exceed five hundred dollars.

In criminal matters they shall have jurisdiction in all cases when the penalty is not necessarily imprisonment at hard labor or death, and when the accused shall waive trial by jury.

C. P. 921.

128. Parish Courts—Parish courts have jurisdiction over the several matters provided for and embraced in title No. three, book one, of the Civil Code, in relation to absentees; and in title eight, book one, of the Civil Code, which treats of minors, of their tutorship, curatorship and emancipation; and in title nine, book one, of the Civil Code, which treats of persons insane, idiots, and other persons incapable of administering their estate; and of all the matters provided for and embraced in title three, part second, of this code, which treats of proceedings in courts of probate.

They have jurisdiction in suits for separation from bed and board, and divorce, where there is no moneyed demand, exceeding five hundred dollars, set up by the plaintiff, and in suits for interdiction, and may act in the emancipation of minors.

The parish judge of any parish shall, in the absence of the parish judge of an adjoining parish, or of the district judge from his several parishes, or when said judges are interested, or are from any cause recused or can not act, grant orders of every kind, in any sort of cases in said courts, which might have been granted by said judges themselves, if not absent or recused, which absence or recusation must be made to appear by the affidavit of the party or his attorney, who applies for such order.

R. S. 1948, 2024, 2027.

129. Territorial Jurisdiction—District and parish courts have no jurisdiction, when actions are brought against persons residing in the State, out of the limit of their respective jurisdiction, except in the cases expressed in this code.

R. S. 519.

1. Courts can not issue process outside of territorial sovereignty.

Interdiction of Dumas, 82 A. 679.

2. Defendant must be sued at domicile, though privilege on his property in other parish be demanded.
Hollander vs. Nicholas, 8 R. 7.
3. Suit filed in one parish may by consent of parties be tried in another by court competent *ratione materiae*. Declarations of domicile estop party.
Stackhouse vs. Zuntz, 36 A. 529, overruling previous decisions; Bank vs. King, 8 R. 248.
4. Surety on attachment bond may be proceeded against in court where original suit is pending.
Wallace vs. Glover, 8 R. 411.
5. So also as to administrator before court appointing him.
Gallier vs. Walsh, 1 R. 276.
6. So also syndic.
Rodriguez vs. Dubertrand, 1 R. 535.
7. Judge of adjoining district called in to replace a recused judge can not in his own judicial district perform any act in the cause.
Halphin vs. Guilbeau, 38 A. 724.

130. Judges Have Necessary Powers Without Special Grant—All judges possess the powers necessary for the exercise of their respective jurisdictions, though the same be not expressly given by law.

C. P. 877; C. C. 21.

(A) *Courts possess powers necessary to exercise conferred jurisdiction.*

Thus they may—

1. Appoint receiver to a partnership.
Gridley vs. Conner, 2 A, 83.
2. Make proper parties.
Canal Company vs. City, 35 A. 70.
3. Issue preliminary writs.
State ex rel. Behan vs. Judges, 35 A. 1077.
4. Send transcript to lower clerk to be corrected.
Tronstine vs. Ware, 38 A. 779.
5. Compel parish treasurer to pay fee of expert witness.
Dardenne vs. Judge, 33 A. 1357.
6. Issue *f. fa.* by Supreme Court to execute a judgment in any matter in which original jurisdiction is conferred.
Lazarus vs. McQuirk, 42 A. 196.

7. Appoint auctioneer to complete sale after death of first auctioneer dying after adjudication.

Covas vs. Bertoulain, 45 A. 160.

- (B) *When without jurisdiction, however, court can only dismiss.*

Succession of Hoover vs. York, 80 A. 753.

131. Contempt of Court—The judges of the Supreme, District and Parish Courts, have the power to punish all contempts of their authority by fine not exceeding fifty dollars, and imprisonment for a period not exceeding ten days, for each offence of that kind.

Constitution, Art. 166.

- (A) *It is no contempt of court.*

1. That a witness testify falsely.

State ex rel. Kane vs. Judge, 37 A. 401.

2. That one should do any act, even when illegal in itself, prohibited by injunction not directed to him.

Barthe vs. Larquie, 42 A. 181.

3. That an act is done in violation of injunction, when injunction is null and void.

State ex rel. Liversey vs. Judge, 84 A. 741; see squarely contra State ex rel. Follet vs. Rightor, 82 A. 1185.

4. That an injunction issues staying execution of judgment of Supreme Court on ground arising since its rendition.

Villavaso vs. Walker, 24 A. 212.

Aliter, when issued on grounds already determined.

Bovee vs. Herron, 24 A. 623.

5. That party to suit fail to produce documents called for under subpoena; penalty is by taking for confessed.

Ins. Co. vs. Purcell, 25 A. 233.

- (B) *It is contempt of court by an attorney.*

1. To assault a judge even during recess.

State vs. Garland, 25 A. 533.

2. To file an answer justifying the assault.

Id.

3. To file insulting brief.

State vs. Grallhe, 1 A. 190; State vs. Keen, 11 L. 600; State vs. Soule, 8 R. 500.

- (C) *When contempt is not in faciem curiæ, a rule on offending party necessary. Aliter when contempt is in faciem curiæ.*

State ex rel. DeBuys vs. Judge, 82 A. 1261; State vs. Soule, 8 R. 500.

Governor may pardon contempt of court.

State ex rel. Van Orden vs. Civil Sheriff, 24 A. 121.

(D) Judgments of contempt of court are unappealable.

State ex rel. Farmer vs. Judge, 31 A. 118; Barthet vs. Judge, 40 A. 434; Kierman & Waters vs. Judge, 41 A. 814; State vs. Civil Sheriff, 52 A. 1235; State vs. Wood, 80 A. 672.

(E) Where court has no jurisdiction to make the order for contempt, proceedings will be set aside on certiorari.

Id.; State ex rel. Liversey vs. Judge, 34 A. 741; State ex rel. Hero vs. Judge, 36 A. 353; State ex rel. DeBuys vs. Judge, 52 A. 1258.

(F) And by habeas corpus in appealable cases only.

O'Malley vs. Houston, 35 A. 1136; Brown vs. Houston, 35 A. 1194; State ex rel. Van Orden vs. Sheriff, 34 A. 120.

(G) Amendatory legislation:

Act 190 of 1894 invests judges of Supreme [Court, district courts and courts of appeal with power to punish for contempt by fine of \$50 or imprisonment not exceeding ten days; provided that no publication out of court shall be construed to be a contempt.

132. Contempt by Attorneys—Attorneys and advocates, when guilty of contempt of the courts before which they plead, are subject to punishment, pursuant to the provisions of special laws.

Fines—When a fine is imposed for any cause, the clerk and sheriff, or coroner and marshal, as the case may be, shall be responsible for the faithful performance of their duty in the collection of the same, pursuant to the provisions of special laws; provided that no fine shall be imposed without a rule on the party to show cause, unless the circumstances of the case should in the discretion of the court require no delay.

R. S. 124, 125.

Any two members of the bar may rule dishonest attorney to show cause why he should not be proceeded against criminally.

State vs. Judge, 2 R. 415.

133. Power to Fine Court Officers and Jurymen—Courts of original jurisdiction may fine the officers and jurymen attached to their courts, when they fail to attend, or neglect their duty. In the case of jurymen the fine shall not exceed fifteen dollars for each offence.

But sheriffs and their deputies, coroners and constables, failing, neglecting, or refusing to execute or serve any order or writ emanating from, or in the name of any court, may, in the cases provided for by special laws, be

fined, at the discretion of the judge, in a sum not exceeding five hundred dollars for each offense and imprisonment in the common jail not exceeding thirty days, and suspended from the execution of their offices; and clerks or their deputies, on their failure, refusal or neglect to execute or obey any legal order of the judge, may be fined in a sum not exceeding one hundred dollars, and imprisoned in the parish jail not exceeding ten days.

134. Subpoena and Attachment of Witness—Those courts may enforce the personal attendance of witnesses before them, by having them properly summoned for that purpose, provided they reside in the parish where the court is held.

Payment of Witness—Any witness who may have been summoned to attend any of the courts, to testify in a civil case, and shall have attended, claimed and received a certificate therefor, shall not again be compelled to obey any summons for attending said court in said case at a subsequent term, until he be paid by the party by whom he was summoned.

C. P. 471.

1. Physicians living more than ten miles from court can not be compelled to attend when lives of patients are in danger.
Art. 103 of 1867.

2. Witnesses attending one term can not be compelled to attend subsequent one unless fees are paid on their demand thirty days before such subsequent term.

Act. 28 of 1882.

135. Attachment and Fine of Witnesses—If a witness who has been duly summoned in a suit, fail to appear personally, the court may order, at the request of either of the parties, that he be brought by attachment before them; and if he does not show good cause for not having

obeyed the summons, the court may fine him in a sum not exceeding one hundred dollars.

C. P. 130, 481, 471.

No attachment when no personal service on such witness.

State vs. Allemand, 25 A. 525.

136. When Witness Refuses to Answer—If a witness summoned in a cause refuse to answer any questions put to him, except such as might lead him to accuse himself of some crime, the court may fine such witness in a sum not exceeding two hundred and fifty dollars, and imprison him for a term not exceeding thirty days.

C. P. 349; Const., Art. 6.

Court may fine witness for not answering, but not for answering falsely.

State ex rel. Cane vs. Judge, 87 A. 401.

137. Damages for Refusal—The party aggrieved by the refusal of a witness to answer the questions put to him has, besides, his action of damages for the loss he may have sustained through his refusal.

C. C. 2815.

Testimony of a witness is privileged and not basis of action for damages.

Gardemal vs. McWilliams, 48A. 454; Terry vs. Fellows et al., 21 A. 875.

138. Commission to Take Testimony—Courts may, at the request of the parties, address commissions to judges of other courts, justices of the peace, or other persons, to take the deposition of witnesses, or the answers to the interrogatories of the parties residing out of the parish where such courts are held, and even of witnesses residing within the parish, when they are old and infirm or expected to leave the State. The formalities to be observed in such cases are hereafter provided.

C. P. 425; 430, 436, 439, 440, 467; R. S. 612.

139. Subpoena Duces Tecum on Party—Courts may, likewise, at the request of either of the parties, order that

the other shall bring into court the object in dispute, of which he is in possession, if it be such movable property as can be produced, in order it may be shown by testimony that it is in reality the object claimed; and if the party refuse to comply with the order, that refusal shall be considered as full proof of the identity of the object.

C. P. 478, 474.

140. Subpœna for Production of Books, Papers, etc., in Possession of Other Party—Courts may also, at the request of one of the parties, decree that the other party bring into court, the books, papers, and other documents which are in his possession, and which are material in the cause, provided the party requesting their production declares in writing and on oath, what are the facts he intends to establish by such books, papers or other documents; and on the refusal of the party thus called upon to comply with the order of the court, the facts stated and sworn to shall be considered as having been confessed, unless satisfactory evidence be shown of the impossibility of producing such documents.

C. P. 478.

(A) Subpœna duces tecum:

1. Notice. Ten days not necessarily required; reasonable time in discretion of court allowed.

Murlison vs. Butler, 18 A. 299; Godel vs. McLanahan, 2 N. S. 48.

2. Return day. Rests entirely in discretion of court.

Murlison vs. Butler, 18 A. 299, 300.

3. Territorial limit. Writ will not issue to party residing out of parish.

Murlison vs. Butler, 18 A. 301.

But books, etc., may be examined under a commission.

Id.; Ludding vs. Fullson, 4 A. 584; Cooper vs. Polk, 2 A. 158; Cain vs. Pullen 84 A. 511.

4. Oath. Facts expected to be proved must be specifically sworn to; else will not be taken for confessed on failure to comply.

Mills vs. Fellows, 80 A. 634.

5. Taking *pro confesso*. Penalty for failing to comply with order when directed to a party to suit; but when directed to third person, penalty is contempt.

Ins. Co. vs. Puroell, 25 A. 283.

6. Subpœna on attorney. Attorney may be subpœnaed to produce papers in his possession.

Travis vs. January, 8 R. 227.

141. Subpœna for Production of Papers, etc in Possession of Third Person—Courts may also, at the request of either of the parties in a suit, order a third person, having in his possession papers, titles, acts, or documents, which may be important in the decision of a cause, to bring them into court on the day fixed for the trial.

See *Cooper vs. Polk*, 2 A. 159; C. P. 444, 475, 917, 919.

142. Notaries Not Bound to Produce Original Acts—Nevertheless, notaries are not bound to produce the record of acts passed before them, of which authentic copies may be obtained, except when it is necessary to prove the genuineness of the signatures affixed to them.

Outside of Orleans original record of court may be ordered.

Act 43 of 1878, p. 98.

143. Mode of Compliance with Subpœna—When a party or a third person has been ordered to produce some books, deeds, or other documents, he must deliver them previous to or on the day fixed for the trial to the clerk of the court, who shall receipt for them, have charge of them, and return them again to the party to whom they belong, after the cause shall have been decided.

C. C. 57, C. P. 473, 474.

144. Courts Have Power to Arrest, Attach, Sequester, Execute Judgments, etc.—Courts have the power to order the arrest and imprisonment of the parties, attachment in the hands of third persons, sequestration, execution, and sale of their property, in the manner and in the cases here-

after provided; they possess, besides, the other powers especially delegated to them by the provisions of the present code.

C P. 180.

145. Courts May Make Rules—The courts are authorized to enact, respectively, rules establishing the mode of proceeding before them in all cases not provided by this code, provided the same be not contrary to the rules here prescribed.

Constitution, 182.

1. Rules of court must conform to law.

Cline vs. Railroad, 42 A. 86; *State ex rel. Levy vs. Judges*, 37 A. 596;
State ex rel. Tebault vs. Judges, 37 A. 596.

2. Rules of Practice in and for Supreme Court govern Courts of Appeal.

State ex rel. Levy vs. Judges, 37 A. 596.

3. Rules of lower courts will not be interfered with unless they are illegal or lead to gross injustice.

State ex rel. Leche vs. Wagner, 42 A. 58; *Green vs. Dakin*, 15 L. 152.

4. Supreme Court may require cases to be submitted on briefs, to be considered in vacation.

Section 10 of Act 45 of E. S. 1870, p. 99.

5. Judges of District Courts of Orleans must revise rules at least once a year in January.

Act 59 of 1872, p. 107.

CHAPTER II.

OF THE ORDINARY PROCEEDINGS.

146. Proceedings—The word proceeding, in its general acceptance, means the form in which actions are to be brought and defended, the manner of intervening in suits, of conducting them, the mode of deciding them, of opposing judgment and of executing them.

The forms are different in ordinary, executory and summary proceedings.

Genereux vs. Simon, 21 A. 654.

Summary proceedings not necessarily by rule.

Fishel vs. Mercier, 32 A. 704.

SECTION I.

Of Demand and of Cumulated Actions.

147. Demand—A demand means a civil action brought before a court of justice to obtain a thing to which one thinks himself entitled.

148. Cumulation—Separate actions may be cumulated in the same demand, except in the cases hereafter expressed; this is termed *cumulation* of action.

C. P. 422.

(A) Actions which may be cumulated.

1. To establish fact of partnership and to secure liquidation.
Mills vs. Fellows, 30 A. 324.

2. Action *en declaration de simulation* and action revocatory.
Johnson vs. Mayer, 30 A. 1208; but see contra Brown vs. Brown, 30 A. 966; Chaffe vs. Scheen, 34 A. 684; Villars vs. Faivre, 34 A. 198.

3. Demand for revendication of immovable, and in alternative demand for its value when incumbered.
Maduel vs. Tuyes, 30 A. 1404.

4. Demand for dissolution of lease and rent up to time of surrender.
Fox vs. McKee, 31 A. 67.

5. Demand for nullity of sale by administrator, for filing account by him, for his removal, and for putting in possession.
Thompson vs. Barrow, 33 A. 1225.

6. Petitory action and partition.
Morris vs. Lalaurie, 34 A. 204; LeBlanc vs. Robertson, 41 A. 1023; Durbridge vs. Crawley, 48 A. 505.

7. Demand for a specific sum and for settlement of partnership.
McNair vs. Gourlier, 40 A. 333.

8. Demand for injunction against extinguished judgment, to compel administrator to make title to property, and to remove said administrator.
Tertron vs. Durand, 25 A. 506.

9. Demand for recognition as heir, account of administration, for property in hands of curator.
Miller vs. Rougieux, 20 A. 598.

10. Demand for separation of property, for injunction against seizure of property claimed by wife as separate.

Atkinson vs. Atkinson, 15 A. 491; Wrinkle vs. Wrinkle, 2 N. S. 388.

11. Demand for injunction of two judgments in one suit.

Medart vs. Fasnatch, 15 A. 621.

12. Demand for damages for breach of contract may sometimes rest on grounds *ex contractu* and *ex delicto*.

Enders vs. Skannal, 85 A. 1005.

13. Demand for separation from bed and board and for divorce, but there must be separate judgments.

Gernon vs. Hickey, 18 A. 464.

Plaintiff making inconsistent demands may at any time before trial discontinue either one.

Dubose vs. Hall, 7 A. 568.

14. Demand for administration of her paraphernal property, and restitution of proceeds of paraphernal property.

Jolly vs. Weber, 85 A. 808.

15. Demand for partition of plantation and account of revenues thereof.

Bayly vs. Beemel, 85 A. 778.

16. Attachment and revocatory action.

Fosworth vs. Burckhalter, 8 A. 865.

17. Separation from bed and board, and separation in property.

Williams vs. Goss, 48 A. 868.

18. Divorce and separation from bed and board.

Mack vs. Handy, 89 A. 491.

19. Opposition to administrator's account, and demand for his destitution.

Gray vs. Waddell, 88 A. 1022.

But a demand for nullity of sale of succession property must be made in separate action.

Succession of Scott, 41 A. 668; Suc. of Sanchez, 41 A. 504.

149. No Cumulation—When—The plaintiff is not allowed to cumulate several demands in the same action, when one of them is contrary to or precludes another.

Demand for Thing and Price—As when one has bought a thing in the name of another, and with his funds, without his authorization, the person for whom the purchase has

been made, can not demand, by the same action, both the thing bought in his name and the money employed for paying the price.

Demand for Rescission and Price—Nor can a vendor demand, at the same time, the rescission of the sale he had made and the price for which it was made; he must decide for one or the other of the two causes of action, as the one precludes the other.

C. P. 55, 57, 152; C. C. 2875.

Actions which can not be cumulated. A party can not:

1. Claim payment of demand out of proceeds of sale and require sale to be annulled.

Dowling vs. Gally, 80 A. 828; Blackly vs. Matlock, 8 A. 574; Ouliver vs. His Creditors, 16 A. 287; Cochrane vs. Violet, 88 A. 525; Mather vs. Knox, 84 A. 410.

2. Claim recognition as owner of cotton and lien and privilege on it.

Adler, Goldman & Seigel vs. Wolff, 86 A. 199.

3. Claim nullity of sale of succession property in opposition to a final account.

Succession of Scott, 41 A. 668.

4. Demand for rescission of contract on account of lesion and of non-payment of price.

Parker vs. Talbot, 87 A. 25.

150. Possessory and Petitory Actions not Cumulated—

In possessory actions, one can not claim, at the same time, both the possession and the ownership; if the two are demanded, it shall be presumed that the possessory has been relinquished in order to resort to the petitory action.

C. P. 54, 55, 57.

151. Cumulation Permitted—When—If the plaintiff has several causes of action tending to the same conclusion, not contrary to nor exclusive of each other, though they arise from different contracts, he may cumulate and bring them in the same suit; as, for example, if one claim from another one hundred dollars in virtue of a sale, and

one thousand dollars in virtue of a loan, or if he claim a movable from another both by inheritance and by purchase.

See C. P. 148.

152. Exception of Inconsistency: Election: Dismissal—

When two causes of action, contrary to and exclusive of each other, have been cumulated in the same demand, the defendant may refuse to plead to the merit until the plaintiff have made his choice as to which of the two he means to proceed with; and if the exception be sustained by the court, the plaintiff shall be bound to amend his petition so as to preserve only one cause of action; otherwise his suit shall be dismissed with costs.

C. P. 54, 55, 56, 57.

Inconsistent demands.

1. Claim of proceeds of sale under mortgage and allegation of nullity of mortgage.

Theure vs. Knorr, 24 A. 597.

2. Petitory action by heirs who retain part of price of property.

Bland vs. Llody, 24 A. 603.

153. Principal and Incidental Demands—Demands are principal or incidental.

The principal demand is that by which the suit is commenced in court; and for this reason it is also termed *ordinary demand*.

An incidental demand is that which is made before issue joined, in order to obtain something relating to the principal object of the suit; such are demands in warranty or in intervention.

154. Same: Jurisdiction—The principal demand must be brought before the court which has the jurisdiction of the case.

The incidental demand must be decided at the same

time with the principal; it is subject to the same jurisdiction as the suit itself.

C. P. 891.

Incidental action follows main suit. Thus:

1. Demand for fruits and revenues follows action of revendication.

Winter vs. Zacharie, 6 R. 468.

2. Garnishment follows attachment.

Marqueze vs. LeBlanc, 29 A. 194; Smith vs. Durbridge, 26 A. 531.

155. Excessive Demand—One should only demand in court what is really due to him; nevertheless, if one demand more, the action shall be sustained for the amount actually due, and the defendant shall pay the costs, unless he prove that, previous to the suit, he made a real offer of the amount actually due to the plaintiff, with the interest and the costs which had accrued.

156. Demand for Less Than is Due—If one demand less than is due him, and do not amend his petition, in order to augment his demand, he shall lose the overplus.

C. P. 91, 92; Stafford vs. Stafford, 25 A. 228; McCaleb vs. Fluker, 14 A. 316; Payne vs. Anderson, 35 A. 979.

But obligations maturing after suit may be separately enforced.

Brandagee vs. Chamberlin, 28 A. 579.

157. Failure to Demand Interest Waives it; Not so Costs—If, in an action of debt, the plaintiff fail to claim the interest due to him, or to amend his petition, in order to include it, he can not, after judgment, demand such interest by another action; he shall be considered as having remitted it.

But, as relates to the costs of the suit, it is not required that they should have been claimed in the petition or answer, in order to recover them; they are due to him in

favor of whom the judgment has been rendered, even if nothing is said on the subject in the judgment.

C. P. 549, 551, 553, 554.

1. Silence of judgment as to interest amounts to rejection.

Succession of Anderson, 33 A. 581.

2. So as to verdict of jury.

C. P. 522; Cochrane vs. Murphy, 4 A. 6.

3. Interest not claimed not allowed.

McIntyre vs. Hall, 20 A. 217.

4. Costs are incidental to judgment.

St. Romain vs. Robeson, 12 R. 194.

158. Premature Demands—When the demand is premature, that is to say, when the action has been brought before the debt has become due, the suit must be dismissed, leaving to the party his right to bring his action in due time.

Demand out of Place of Delivery, or before Happening of Condition—The same rule must be observed if the object due be demanded out of the place where it was to have been delivered, or if the obligation be conditional, and its execution be demanded before the condition has been fulfilled.

C. C. 2062, 2169; C. P. 244, 14, 533; Catlett vs. Heffner, 28 A. 577; Thompson vs. Moulton, 20 A. 528; Forbes vs. Drumm, 15 A. 707; 48 A. 564.

159. Demands in Writing—Exceptions—Judicial demands are either verbal or in writing.

It is only before justices of the peace that demands may be made verbally, as will be provided in the rules to be observed for proceeding before the tribunals of justices of the peace.

All other demands brought before the court must be in writing, and in the form of a petition.

C. P. 170, 169; 1078.

160. No Prescribed Forms—Though there be as many kinds of demands as there are actions, those which must be made in writing are subject to no distinct and peculiar

form; they are only subject to a few general and common rules hereafter provided.

161. Demand Must be Clear—It is sufficient in all judicial demands which are required to be in writing, to express clearly what is demanded, with such conclusions as may serve for a basis to the judgment to be rendered in the cause.

SECTION II.

Before What Tribunals Actions Are to be Brought.

162. Defendant Must be Sued at Domicile—It is a general rule in civil matters that one must be sued before his own judge—that is to say, before the judge having jurisdiction over the place where he has his domicile or residence, and shall not be permitted to elect any other domicile or residence for the purpose of being sued, but this rule is subject to those exceptions expressly provided for by law.

C. C. 88, 46; C. P. 89, 877, 90, 129, 164, 168, 872, 884; R. S. 518, 1208, 1204, 2858, 2412, 2662, 8714, 8722, 8884, 8956, 96; C. P. 163 is Act of 1861, p. 187.

(A) What is domicile.

15 A. 213; 27 A. 566; 24 A. 515; 28 A. 248.

(B) Who are not excepted from this law.

1. Branch Pilots.

State ex rel. Egan vs. Follet, 83 A. 280.

2. Assessors or police jurors.

Nelson vs. Fournet, 80 A. 1108.

3. Police jury, acting for whole parish, can not be sued in any court having territorial jurisdiction of only a part of the parish.

Berthaud vs. Police Jury, 7 R. 550.

(C) Exceptions.

1. Partners, who, during existence of partnership, must be sued as such at social domicile.

Hobson vs. Whittemore, 18 L. 422; Banlett vs. Collier White Lead Co., 30 A. 60.

- (a) But after dissolution partners may be sued at individual domicile.

Black vs. Savory, 17 L. 86.

- (b) Though they may also be sued at social domicile.

Loddell vs. Bushnell, 24 A. 796.

2. Officers and sureties on official bonds, who may be sued in parish where they exercise or exercised their functions, regardless of actual domicile.

School Board vs. Weber, 30 A. 536; R. S. 351.

3. Corporations where sued *ex delicto*, or *ex contractu* for damages done by commission of overt act.

Montgomery vs. Levee Co., 30 A. 607; Allen vs. Tarleton, 22 A. 427.

Morgan R. R. Co., exempted by charter from suits elsewhere than at domicile, except in cases of trespass.

Payne vs. R. R. Co., 43 A. 981.

4. Proceedings *in rem* founded on privilege or mortgage.

McKensie vs. Bacon, 33 A. 764.

- (D) Where execution is levied in another parish, courts there may enjoin, regardless of residence of execution debtor.

Aronstein vs. Weber, 21 A. 199; see also 16 A. 110; 5 A. 644; 4 A. 64; 2 A. 523, 492; 15 A. 846; 23 A. 561; 22 A. 428.

- (E) Foreign corporations, having no regular agent, may be sued where cause of action arose.

149 of 1890.

- (F) Waiver of personal jurisdiction.

1. By appearing and pleading to merits.

33 A. 910; C. P. 93; 18 A. 75; 19 A. 277; *Marqueze vs. LeBlanc*, 29 A. 194; see 10 L. 228; 11 R. 418; 11 R. 402; 8 A. 222; 4 A. 350; but see 23 A. 257; 21 A. 258, 530; *Kelly vs. Lyons*, 40 A. 498; *Stevenson vs. Whiney*, 33 A. 657; *Phipps vs. Snodgrass*, 31 A. 88; *Tupery vs. Edmonson*, 32 A. 1146.

2. By consent after suit brought to its transfer to another parish.

Stackhouse vs. Zuntz, 36 A. 523.

But a waiver in advance of suit is forbidden.

Id., and 18 A. 88.

- (G) Proposed interdict must be sued at actual domicile, not merely legal or constructive domicile.

Dumas' Case, 32 A. 679.

- (H) Judge of District Court of one parish may be sued in adjoining parish when there is no competent judge in his own parish.

State *ex rel.* Schwing vs. Fontelleu, 30 A. 1122.

(I) *Garnishees under attachment must appear before court issuing writ, irrespective of domicile.*

Marqueze vs. LeBlanc, 29 A. 194.

Aliter as to garnishee under a judgment.

Alter vs. Pickett, 24 A. 513; Harrison vs. Hershheim, 28 A. 881.

(J) *Non-resident owners of plantations sued through agent, overseer or manager, by mechanics, laborers and others working thereon, in the parish where labor or work done.*

Act 92 of 1873, p. 163, supplemented by Act 25 of 1874, p. 59, granting trial in chambers on three days' citation, and making appeals returnable in three days.

(K) *Domiciles of persons not sui juris.*

1. *Minor, that of tutor.*

Succession of Stephens, 19 A. 500.

2. *Wife, that of husband.*

Succession of McKenna, 23 A. 869; Sanderson vs. Ralston, 20 A. 312; Claude vs. Peet, 43 A. 163.

(a) *But wife returning here may sue absent husband here for divorce.*

Smith vs. Smith, 43 A. 1140.

(b) *But where husband and wife never resided here neither party can come here and sue other for divorce.*

Edwards vs. Green, 9 A. 317; Heath vs. Heath, 42 A. 438; Muller vs. Hinton, 13 A. 11.

(c) *Aliter* where husband had acquired domicile here.

Laguie vs. Wife, 40 A. 459.

(L) *Uncertain domicile.*

Persons whose domicile is not fixed may be sued in either parish.

Villere vs. Butman, 23 A. 515; Berry vs. Gaudy, 15 A. 533; Evans vs. Payne & Harrison, 30 A. 498.

(M) *Evidence of domicile.*

Voting and other acts showing fixity of residence.

Sanderson vs. Ralston, 20 A. 319; McGee vs. Brown, 4 A. 186; Lacock vs. Davidson, 9 A. 162; Hyman, Lichtenstein & Co. vs. Schlenker & Hirsch, 44 A. 117; 4 A. 554; 7 A. 400.

(N) *Former domicile.*

Suit before former domicile allowed within one year after removal if defendant has made no public declaration.

King vs. Watts, 23 A. 563.

(O) *Estoppel as to plaintiff.*

Plaintiff is estopped from denying that defendant's domicile is where he is sued.

Stevenson vs. Broadwell, 26 A. 887.

isions of one court.

Orleans parish various divisions may have jurisdiction, and no irregularity in allotment will impair judge's authority in absence of timely objection.

Peroni vs. Riley, 89 A. 802; *State ex rel. Buieson vs. Lazarus*, 88 A. 1425; *State ex rel. Improvement Co. vs. Judges*, 41 A. 570; 44 A. 1007; 48 A. 582, 826.

Actions to Revendicate Real Estate or to Enforce Liens—In actions of revendication of real property, no proceedings are instituted in order to obtain the sale of real property, in virtue of an act of hypothecation importing confession of judgment, the defendant may be cited, whether in the first instance or on appeal, either within the jurisdiction where the property is situated, though the defendant's domicile or residence be out of that jurisdiction, or where the defendant has his domicile, as the plaintiff chooses.

See 840; C. P. 44, 123, 43, 732, 734.

Revendication of real property.

Roman vs. Denney, 17 A. 127; *Maduel vs. Tynes*, 80 A. 1404; *Second Municipality vs. Garland*, 11 R. 887.

Incidental demand for fruits and revenues, as incident, follows the main action.

Winter vs. Zacharie, 6 R. 466.

In a suit to recover proceeds of lands must be before court the defendant's domicile.

Edwards vs. Ballard 14 A. 868.

A suit by widow of deceased heir claiming usufruct of his estate is an action of succession is not action of revendication.

Denegre vs. Denegre, 83 A. 689.

An action of simulation is one of revendication.

Edwards vs. Ballard, 20 A. 169.

This is an action against succession for recovery of movable property or fund susceptible of identification.

Bouchard vs. Parker, 82 A. 5.

7. Executory process.

Scott, Williams & Co. vs. Turner, 15 A. 346; 11 R. 337.

And court issuing executory process has exclusive jurisdiction of all conflicting mortgage claims.

Factors and Traders' Ins. Co. vs. DeBlanc, 31 A. 100; Buckner vs. Wisdom, 31 A. 52; Adams & Co. vs. Daunis, 29 A. 320.

8. Hypothecary actions against third possessors.

Generes vs. Simon, 21 A. 509; Gantt vs. Eaton & Barstow, 25 A. 508.

Aliter where mere personal judgment asked on mortgage note.

Id.

9. Where property is subject to a lien and privilege justifying a sequestration or provisional seizure, it may be seized where found, under Act 64 of 1876, p. 106; but judgment limited to property seized.

Prior to 1876 jurisprudence was otherwise.

Gay & Co. vs. Eaton & Barstow, 27 A. 166.

10. Suits for labor, supplies and material furnished to plantations. Suits may be brought before any court of competent territorial jurisdiction over property by parties holding claims against any citizen of this State for labor performed, or for supplies or materials furnished, or for improvements made upon any farm or plantation or real estate.

Act 16 of 1886.

164. Suits Relative to Successions—In matters relative to successions, the defendants though domiciliated elsewhere, must be cited to appear before the court of the place where the succession has been opened:

1. In all suits brought by the heirs against each other, until after partition inclusively;

2. In all suits brought by the creditor of the deceased previous to the partition;

3. In all suits relating to the execution of testamentary dispositions until the final settlement of the affairs of the estate has been effected;

4. When a partition of a succession has been or may be made belonging to one or several heirs, who are present

presented therein, all the real and personal actions, and suits which are relative to said succession, shall be brought against the said heirs before the court where the succession is opened.

187; C. P. 924, 986, 1025.

Succession ends where heirs take possession.

Johnston vs. Labatt, 25 A. 143; Provost vs. Provost, 26 A. 611; Woolfolk vs. Woolfolk, 30 A. 144.

Partition suit to divide land partly owned by a succession need not be brought before court in which succession is opened.

Bailey vs. Beene, 30 A. 1032.

Court in which succession opened has sole jurisdiction to construe will and determine rights thereunder.

Denegre vs. Denegre, 33 A. 689.

Exceptions to Rule of Domicile—There are other exceptions to this rule which require that the defendant be brought before the judge having jurisdiction over the defendant's domicile or residence; they are here enumerated:

Partition of Real Property—In matters relative to the partition of real property between several co-proprietors in such a case the suit must be brought before the court of the place where such property is situated, although the co-proprietors may reside in different parishes.

Partnership—In matters relative to partnership, as long as the partnership continues, in all suits concerning the partnership parties must be cited to appear before the tribunal of the place where it is established, or if there are several establishments, before that of the place where the partnership was entered into:

Failure—In matters relative to failure, all the suits commenced, or which may be subsequently instituted against the debtor, must be carried before the court in which the failure has been declared;

Warranty—In matters relative to warranty, they

must be carried before the court having cognizance of the principal action in which demands in warranty arise;

5. Foreigners and those having no Known Place of Residence—When the defendants are foreigners or have no known place of residence in the State, they may be cited wherever they are found.

6. Joint Obligors—When the defendants are joint obligors, they may be cited at the domicile of any one of them;

7. Official Bonds—In suits to enforce the collection of bonds of State and parish officers, the courts of the parish in which the officers exercise the duties of their offices shall have jurisdiction over the securities, it matters not in what parish they may reside.

8. Trespass on Real Estate—In actions of trespass on real estate, and in all matters relating to real servitudes, be they natural or conventional, the judge of the place where the property is situated shall have cognizance of the cases.

9. Trespass by Corporations—In all cases where any corporation shall commit trespass, or do anything for which an action for damages lies, it shall be liable to be sued in the parish where such damage is done or trespass committed.

R. S. 19, 2412; C. C. 1290, 88, 1137, 1291; C. P. 129.

Par. 1. Partition of immovables by destination.

Anderson vs. Stille, 12 A. 670.

Par. 2. Partner.

See C. P. 162.

But stockholder sued by a corporation must be sued at his domicile.

Bank vs. Lattimore, 4 R. 343.

Par. 3. Suits against syndic as such for possession of property surrendered by insolvent must be brought before court having jurisdiction of the failure.

44 A. 461; 41 A. 41.

Aliter as to suit for damages against syndic personally.

Clossman vs. Barrancey, 2 R. 816; Syndic vs. Pierce, 3 N. S. 575.

ar. 4. Warrant.

Oliver vs. Bry & Stephens, 7 A. 590.

ar. 5. Foreigners, or non-residents of the State, sued where found.

DeForet vs. Gusman, 30 A. 980, 982.

ar. 6. Joint obligors.

Since Act 108 of 1870 found in Acts 1871, p. 19; Adams & Co. vs. Pannell
Scott et als., 26 A. 528.

ar. 7. Suits on official bonds.

C. P. 162.

ar. 9:

Where corporation commits trespass or does act causing damage.

Houston vs. R. R. Co., 39 A. 796.

But for passive breaches of contract corporations must be sued at domicile.

Montgomery vs. Levee Co., 30 A. 607.

By statute, breaches of certain contracts may be sued on where breach occurs. Thus public carriers may be sued at point of delivery for all freight which they may fail, refuse or neglect to deliver, or for all damages for such failure, or for damages done to goods in transit.

Act 98 of 1898.

And also laborers' claims for work done; and corporation must designate local agent to receive process.

Act 134 of 1890.

Section 12 of Act 37 of 1877 excepts Morgan's Louisiana & Texas Road Company from all suits except for trespass outside of its domicile.

Mirs of Gossin vs. Morgan's R. R. Co., 36 A. 187; St. Julien vs. R. R. Co., 39 A. 1064.

What is trespass.

An act implying use of force, such as—

(a) Killing a mule.

State ex rel. R. R. Co. vs. Judge, 33 A. 954.

(b) Violation of a general duty, not a contract obligation, unless violation of contract is accompanied by violence.

Brigham vs. Curator, 26 A. 677.

Petition, alleging action to be ex delicto, not conclusive; nature of case determines.

John vs. Carrollton, 10 A. 719.

Act 22 of 1894 amends C. P. 165 so as to add: In all suits on policy of insurance, plaintiff has option to sue at domicile, or where agency is, or where loss occurred.

Act 167 of 1894 plaintiff may sue in place where factory used for sugar cane or syrup sold.

166. Defendant Residing in Different Parishes—If a defendant reside alternately in different parishes, he must be cited in that in which he appears to have his principal establishment, or his habitual residence.

If his residence in each appear to be nearly of the same nature, in such a case he may be cited in either, at the choice of the plaintiff, unless he has declared, pursuant to the provisions of the law, in which of those parishes he intended to have his domicile.

C. C. 41.

Equivocal domicile.

1. When domicile is doubtful defendant may be sued at either place at option of plaintiff.

Berry vs. Gaudy, 15 A. 533; *Taylor vs. Bach*, 17 A. 61; *Crawford vs. Reed*, 9 R. 243.

2. Declaration of domicile governs in doubtful cases.

Judson vs. Lathrop, 1 A. 79; *Cole vs. Lucas*, 2 A. 947.

3. But not when inconsistent with acts.

Yerker vs. Broom, 10 A. 94.

4. Where a man has a dwelling in one parish and a place of business where he spends part of the day in another, his domicile is where his residence is.

Hill vs. Spangenburg, 4 A. 554.

167. Where Defendant Changes Domicile—If the defendant change his domicile, he must be cited in the parish where he has resided within the last year, or within that where he has declared in the manner prescribed by law, that he intended to have his domicile.

C. C. 38, 41, 42; *Berry vs. Gaudy*, 15 A. 533.

168. Declaration and Acts of Domicile—If the defendant has not made such a declaration, he may, nevertheless, be cited in the parish where he lives, though he has not resided one whole year in it, if he has done in that parish acts which manifest sufficiently that he intended to make it the place of his domicile.

C. C. 38, 41.

SECTION III.

Of Petition and Citation.

Amicable Demand—It is not necessary previous
ing a suit, to make an amicable demand in writing.

320; C. P. 159.

amicable demand saves costs to plaintiff.

Orleans Navigation Co. vs. Municipality No. 2, 17 L. 269.

And tender (C. P. 407) save costs to defendant.

Wood vs. Hennen, 9 A. 264; Thompson vs. Edwards, 23 A. 183.

o amicable demand required against absentee.

Millaudon vs. Beasley, 2 A. 916.

Petition—Every demand in writing must be com-
by a petition.

Summary Process, C. P. 732, 161, 159.

proceedings by rule or on motion must be specially allowed by
else action should be by petition.

ce no proceeding by rule allowed.

o obtain possession on tax title.

Fishel vs. Mercier, 32 A. 704, and cases cited.

o hold intervenor bonding attachment liable for judgment
ainst defendant.

Ledda vs. Maumus, 17 A. 817.

o matters purely incidental to main proceeding, rules are
l.

ck vs. McCausland, 24 A. 257.

Petition—A petition is a written document which
ntiff addresses to a competent judge, setting forth
se of the action which he intends to bring against
ndant, and praying to be permitted to cite that de-
before him, in order that he may be ordered to do
ve a certain thing.

Id.—The petition must be drawn in the English
e and it must mention:

he name or title of the court to which it is ad-

2. The name, surname and place of residence of the plaintiff.
3. The name and the place of residence of the defendant, or the place where he lives.
4. The petition must contain a clear and concise statement of the object of the demand, as well as of the nature of the title, or the cause of action on which it is founded.
5. It must not contain any insulting or impertinent expression.
6. It must end by conclusions analogous to the nature of the action to which the plaintiff has resorted.
7. It must be signed by the plaintiff or his attorney in fact, or by his advocate.

C. P. 552.

1. Petition must be in English language, but parts not essential may be in other language.

Generes vs. Simon, 21 A. 653.

And, if not in English, exception must be pleaded *in limine*.

Leon vs. Bouillet, 21 A. 652.

2. Person suing as agent must disclose name of principal.

Willard vs. Lugenbuhl, 24 A. 18.

3. Name of State in which plaintiff resides is sufficient.

Simpson vs. Lombas, 14 A. 108.

4. Where person has only one name, that is sufficient.

Rachel vs. Jones, 34 A. 110.

5. Specific allegations required.

2 R. 316; *Bry vs. Fouche*, 11 A. 665.

6. Annexed documents supplement vague allegations.

Polloe Jury vs. Mahoudeau, 27 A. 224.

But not so far as to supply vital and essential allegations.

Abadie vs. Berges, 41 A. 281.

7. In divorce suit, acts of adultery must be described with certainty as to time, place and person.

Compton vs. Compton, 9 A. 499; *Perkins vs. Potts*, 8 A. 15.

8. Evidence of whose intended introduction litigants are aware, causing no surprise, is not excluded for want of explicit pleadings.

Assurance Co. vs. Ulhorn, 41 A. 335; *Doulut vs. McManus*, 37 A. 306.

Matters of detail not within knowledge need not be pleaded.

State vs. Gauthreaux, 35 A. 1168.

Cause of action must be fully disclosed.

32 A. 1029; 39 A. 660; 34 A. 323.

Redundancies in pleading stricken out on motion.

Bevens vs. Weil, 30 A. 185; Woolfolk vs. Woolfolk, 20 A. 515.

Specific relief must be demanded. No relief *ultra petitionem*.

Trimble vs. Pleasants, 35 A. 874; Hood vs. Segrest, 1 R. 109; 35 A. 874; 34 A. 892; 35 A. 979; 34 A. 405; C. P. 156; 37 A. 492.

Exception to last rule: Tenor of petition and prayer for general relief may often warrant decree not specifically prayed for.

Henderson vs. Trousdale, 10 A. 548; Levett vs. Lapeyrolerie, 38 A. 912.

Signature of attorney may be through agent.

Martin vs. Moore, 11 A. 121.

Signing is sufficient without designation as attorney.

Merrill vs. Lattimore, 12 R. 139.

Signing of annexed affidavit is sufficient signing of petition.

Zollicoffer vs. Briggs, 3 R. 236.

Title of court. When error is merely clerical, exception arising from error in the title of court will be overruled.

Clark vs. Comfort, 45 A. 502.

Certainty of Petition—If the plaintiff demand a specific object, he must describe it with certainty in his petition, in such a manner as to leave no doubt as to the relief demanded.

Ambiguities in petition which do not prevent court from ascertaining what is demanded are not fatal.

Lea vs. Terry, 15 A. 159.

Annexing Acts—When the action is founded on a private or public act, an authenticated copy must be annexed to the petition, in order that it may be communicated to the defendant, if he require it; but it shall not be necessary to serve the same on the defendant.

C. 820.

1. Where defendant annexes act to answer, plaintiff may amend to charge its simulation.

West vs. Hickman, 14 A. 620.

2. Annexed documents control allegations of petition or answer.

Teutonia Bank vs. Wagner, 33 A. 782; 14 A. 868; 1 R. 449; 18 A. 680; 27 A. 224; 7 A. 296; 6 L. 276; 14 L. 868.

3. But do not supply essential deficiency.

Abadie vs. Berges, 41 A. 28.

4. Evidence need not be alleged to be in writing.

Brown vs. Caves, 19 A. 438.

175. Oyer—But if the title on which the demand is founded be an act under private signature, or a note bearing the signature of the defendant, it shall not be necessary to annex to the petition the original of such an act, or the note itself, provided that if the defendant pray a view or oyer of the document declared upon, the court shall order the same to be filed within a reasonable delay, and in default of the plaintiff's complying with said order, his petition shall be dismissed.

R. S. 521, 2623; C. P. 324, 526, 494.

1. Defendant can not demand oyer of unmatured notes not sued on.

Consolidated Association vs. Hughes, 10 A. 610.

2. Defendant may refuse to answer until he has oyer of documents sued on.

Police Jury vs. Mahoudeau, 27 A. 225.

3. Defendant can not demand oyer of document not sued on, but which is to be used in evidence.

Ins. Co. vs. Harrison, 26 A. 1.

176. Filing Petition, etc.—The petition, together with all the annexed documents, must be delivered to the clerk of the court to which it is addressed, who shall receive it, and endorse immediately the date of the day, month and year when he received it.

Party filing documents must see that clerk marks them "filed."

Ford vs. Brooks, 35 A. 151; *Stafford vs. Harper*, 32 A. 1078.

Waiver of Service, etc.—The defendant, or his attorney, may waive the service of plaintiff's petition, pro-
 e defendant, or his attorney, certify in writing,
 er his signature, on the back of the original de-
 o the clerk, that he acknowledges that the peti-
 been duly served on him; in such case the clerk
 be entitled to charge for a copy, nor the sheriff
 on.

er of citation may be otherwise shown.

vs. Brunner, 42 A. 778; 7 A. 61.

may not waive service of petition and citation.

**Officers of corporation in suit to declare forfeiture of
 charter.**

State vs. Citizens' Bank, 31 A. 886.

Attorney ad hoc.

He can not waive any legal rights.

Carpenter vs. Beatty, 12 R. 540; Hill vs. Barlow, 1 R. 142; Ticknor
 vs. Calhoun, 28 A. 238; Bienvenu vs. Traders' Ins. Co., 33 A.
 206; Cormier vs. DeValcourt, 33 A. 1168.

He may, however, acknowledge service on him.

Bartlett vs. Wheeler, 31 A. 548. Millaudon vs. Beasley, 2 A. 916;
 Heirs of Fly vs. Noble, 37 A. 667.

Alleged insane person in suit to interdict.

ernon vs. Horrell, 23 A. 27.

Attorney in fee.

helps vs. Broughton, 27 A. 592.

may accept service and waive citation.

Administrator.

ogan vs. Herbert, 30 A. 727.

**Waiver of service and waiver of citation authorize default
 unless delay reserved. Quere?**

vs. Payne & Harrison, 30 A. 498.

Attorney can not certify a waiver.

on vs. Goffe, 15 A. 86.

Clerk Must Make Copy and Annex Citation—

to whom the petition has been delivered, must,
 the case above expressed, make out a faithful

and exact copy of the same in the language in which it was presented, in order that it may be served on the defendant, and he must annex to that copy a citation addressed to the defendant, in the form prescribed in the following article.

C. C. 891.

1. No extra-territorial service of citation.

Interdiction of Dumas, 32 A. 679.

2. Defective citation cured by answer to merits.

Society vs. Morris & Co., 24 A. 847.

179. Essentials of Citation—The citation addressed to the defendant must be drawn in English; it must mention:

1. The title of the cause.
2. The name of the defendant to whom it is addressed, the place of his residence, or that where he happens to be, in the manner set forth in the petition.
3. The name or title of the court before which the defendant is cited to appear.
4. It must summon the defendant either to comply with the demand contained in the petition, of which a copy accompanies the citation, or to deliver his answer to the petition in the office of the clerk of the court in which he is cited to appear. The place where such office is held must be expressed.
5. The citation must express the number of days given to the defendant to file his answer, according to the distance from his residence to the place where the court is held, to be reckoned from the day when the citation was served.
6. It must express the date of the day, month, and year, when it was delivered.
7. It must be signed by the clerk who delivers it, and express his quality; it must be sealed with the seal of the court by whose order it is given.

C. P. 318.

sites of citation.

Place of cause may appear in any part of citation.

Bank vs. Eian, 10 R. 26.

Citation must be addressed to defendant:

A. 380.

1) Not to a person claimed to be agent.

Jacob vs. Frere, 28 A. 625.

2) Not to a third person, even when served on defendant.

Waddil vs. Payne & Harrison, 28 A. 772.

Joint obligors must be each cited.

Blanc vs. Marsoudet, 25 A. 464.

Citation to curator *ad hoc* of absentee valid.

A. 405; Cooper vs. Polk, 2 A. 159; Monition of Hall, 21 A. 692.

Power to receive citation for another must be express and special.

Blanc vs. Ferroux, 21 A. 27.

Citations to representatives of parties litigant must mention capacities.

Alouche vs. Grivot, 18 A. 481; Carnutz vs. Bank, 20 A. 85; see Caldwell vs. Heirs of Cooper, 6 R. 9; Harris vs. Alexander, 1 R. 30.

Number of days delay must be given.

Upuy vs. Arceneaux, 21 A. 629.

Citation must be signed by clerk or deputy.

Succession of Marigny, 22 A. 172.

Copy of citation need not have seal.

Bedley vs. Voris, 2 A. 140.

Citation is not absolutely required in citation.

Signature of judge.

Benken vs. Farmer, 8 R. 155; State vs. Head, 22 A. 55.

Residence of defendant when it is stated in accompanying citation.

Succession of Marigny, 22 A. 171.

Place where court is held, provided citation shows name of court and what court issues it.

Landry vs. Dickson, 7 A. 239; Driggs vs. Morgan, 10 R. 119.

Where citation or return defective, cause is remanded.

Edgell & Co. vs. Knox & Pugh, 16 A. 180; Adams & Co. vs. Basile, 35 A. 101.

Delay for Answering—The delay to be expressed in citation consists of ten days, to be counted from the

time the citation has been served, which are allowed to the defendant to comply with the demand of the petition, if the defendant reside in the place where the court is held, or within ten miles from such place.

If the defendant reside at a greater distance, the aforesaid delay shall be increased by one day for every ten miles that his residence is distant from the place of holding the court before which he is cited to appear.

In counting the ten days neither the day when the citation has been served, nor the day when the delay expires, are included.

C. P. 818, 881, 1083.

1. Ten full days must be allowed. Default prior to that null and judgment null.

2 R. 448; Fowler vs. Smith, 1 R. 448; Arthur vs. Cochran, 12 R. 43; Williams vs. Dunn, 2 A. 806; Hart & Co. vs. Nixon & Co., 25 A. 137; Evans vs. Payne, 30 A. 498.

2. Where last day falls on *dies non*, whole of next day is allowed.

Catherwood vs. Shepard 30 A. 677; Garland vs. Holmes, 12 R. 42; Mercer vs. Judge, 29 A. 228.

3. Provision for delay according to distance from court house does not apply to defendants residing out of State.

West vs. Wilson, 4 L. 220.

4. Distance to court house computed over ordinary road, not a mere cut-off.

Woodward vs. Dashiell, 15 L. 188.

181. Number of Copies—If there are two or more defendants to the suit, the clerk shall make out as many copies of the petition as there are defendants in the cause, whether they all reside in the parish where the court is held, or in different parishes, even if these be out of the jurisdiction of that court.

C. C. 2085.

1. Where a partnership, not commercial, is sued, each member must be cited.

McGee vs. McCord et al., 14 L. 162; Stevenson & Co. vs. Eiser, 23 A. 621.

ter when firm is commercial.

earney vs. Spencer, 14 A. 570; Montague vs. Well & Bro., 80 A. 52.

ation must be addressed to both wife and husband,
on one single citation issues.

arrioneaux vs. Down, 19 A. 208.

ne Citation and One Petition for Husband and
Minors, Partnership Corporation, Absentees—
less, if the defendants are husband and wife,
s, interdicted, or absent persons having the same
or person represented by the same attorney in
partners of the same firm, or members of the
poration, it will be sufficient to deliver one single
and one single copy of the petition to the person
ting such defendants.

8, 192.

ation to the wife and "her husband" is a sufficient cita-
a to the husband.

hipps, vs. Snodgrass, 31 A. 88.

e citation sufficient.

ordan & Co. vs. Anderson, 29 A. 750; Gaines vs. Morris, 6 R. 4; Gilmore
vs. Gilmore, 9 A. 197; McElvin vs. Taylor, 80 A. 352.

mmercial firm is meant in above article.

tevenson & Co. vs. Elser, 28 A. 421.

Clerk Sends Petition and Citation to Sheriff—The
st address without delay, the copy of the citation
e petition intended to be served on the defendant
eriff of the parish where that defendant resides.

8.

d., For Defendants in Other Parishes—If, among
ndants, there be some who reside out of the juris-
of the court before which the suit is pending, the
st address to the sheriffs of the different parishes
ey reside, copies of the citation and petition in-
or such defendants, in order that they may be
n them, and such return made of the service as
ter provided.

1. No process can be served outside of the State.

Interdiction of Dumas, 32 A. 679.

2. See Act 92 of 1893 constituting overseers agents of non-resident owners to stand in judgment in suits by laborers for wages, etc.

185. Endorsement by Sheriff—The sheriff to whom the clerk delivers or addresses copies of a petition and citation to be served on a defendant, in the manner above provided, shall endorse upon the same a certificate of the day, month and year, when those documents have been received by or delivered to him.

186. Service by Sheriff—The sheriff must serve those copies, without any delay, on the defendant named in the citation; and when there are several defendants to the same suit, he must make as many services as there are citations; always conforming, in either case, with the provisions hereafter enacted.

C. P. 1026.

1. Ordinary diligence in service is required.

Bloomfield vs. Jones, 2 A. 983.

2. Service by *de facto* sheriff is good, and no exception as to sheriff's capacity allowed.

Gradnige vs. Moore, 10 A. 670, citing 5 A. 156, 5 A. 161, 8 A. 633.

187. Modes of Service—The citation and the petition accompanying it may be served in two different ways, by being delivered to the defendant in person, or by being left at his domicile.

188. Personal—The service is made in person when the citation and petition are delivered to himself.

189. Domiciliary—It is made at the domicile when the copies of the citation and petition are left at the usual place of domicile or residence of the defendant, if he be absent,

ering them to a person, apparently above the age
teen, living in the house.

s.

iff's return of service at domicile must show:

that service was made at domicile. Service at store not
connected with dwelling invalid; so also at office.

Adams & Co. vs. Basile, 85 A. 101; Marin vs. Thierry, 29 A. 862; Mc-
Cracken vs. Simms, 19 A. 88; 12 L. 550; 14 L. 212; 5 A. 147-217; 12 A. 289;
Lehman, Stern & Co. vs. Broussard, 45 A. —; 21 A. 26.

that if store was domicile, service was made there.

td.

that defendant was absent.

Okey vs. Drummond, 4 A. 868; Arnault vs. St. Julien, 21 A. 680; Ken-
drick vs. Kendrick, 19 L. 86.

that the service was made on one living in the house with
defendant.

Walker vs. Barelli, 82 A. 470; Lewis vs. Smith, 24 A. 617; Feazel vs.
Cooper, 15 A. 462; Thibodaux vs. Wright, 8 A. 180; Cole vs. Hoeha, 21
A. 618; 24 A. 617, and cases cited; Arnault vs. St. Julien, 21 A. 680.

that said person was apparently above the age of fourteen.

Adams & Co. vs. Basile, 85 A. 101.

that sheriff knew name of party to whom he handed cita-
tion or learned it by interrogating that person.

O'Hara vs. Lumber Co., 42 A. 226.

Amendment of return:

where service was good, but return bad, sheriff may amend
when case is remanded.

Adams & Co. vs. Basile, 85 A. 101; O'Hara & Whitney vs. Lumber Co.,
42 A. 227.

that not after judgment when citation is null.

McBlanc vs. Perroux, 21 A. 26.

That officer amends:

deputy serving may amend.

McKnight vs. Connell, 14 A. 897.

*Service anywhere at domicile is valid. Overseer in rear of
house may be served there.*

Division of McCalop, 10 A. 224; Maxwell vs. Collier, 6 R. 86; Rousseau vs.
Arre, 24 A. 855.

(E) Return sole evidence of service:

1. Citation proved only by sheriff's return—not by parol evidence.

Gliddon vs. Goos, 21 A. 682; LeBlanc vs. Perronx, 21 A. 26; Harris vs. Alexander, 1 R. 80; Hobson vs. Peake, 44 A. 887.

2. Return itself, unaided by evidence *aliunde*, must establish all essentials of domiciliary service.

Corcoran vs. Eiddell, 7 A. 268.

190. Service on Defendant Sui Juris—The petition and citation must be served on the defendant in person or left at his domicile, in the manner provided in the two preceding articles, in all cases where the defendant is of age, enjoys civil rights, is present in the place, or has there his acknowledged domicile or residence.

C. P. 254.

191. Service on Defendant not Sui Juris—But if the defendant be a minor, a person interdicted, or a married woman, or if the suit be brought against the members of a corporation, of a public institution, or of a commercial partnership, the petition and citation must be served in the manner hereafter provided in the following articles.

192. Service on Married Woman—If the petition and citation be directed against a married woman not separated from bed and board from her husband, the service may be made by delivering to either the husband or the wife, or by leaving them at the domicile of the latter, by delivering the same to a person apparently above the age of fourteen years, living in their house.

1. Citation addressed to wife and husband, and served upon the wife in person, is sufficient.

Gaincs vs. Morris, 6 R. 4; Harris vs. Alexander, 1 R. 80; Holt vs. Liquidators, 33 A. 678.

2. Also if served on the husband.

McElvin vs. Taylor, 80 A. 532; Jordan & Co. vs. Anderson, 29 A. 749.

193. Service on Woman Divorced or Separated—But if the woman be separated from bed and board, or divorced from her husband, the service must be made as if *sole*.

Service on Tutor or Curator—If the suit be brought against minors not emancipated, interdicted or absent persons whose property is administered by a curator, then petition and citation must be served either by delivery in person to the tutor or curator of such minors, interdicted or absent persons, or by leaving them at the usual place of domicile or residence of such tutor or curator.

C. 56, 145; C. P. 116, 968.

Curator can not waive any legal rights.

Hill vs. Barlow, 6 R. 142.

Service on Special Tutor—If the minors, the interdicted or absent persons, against whom the suit is brought, had no tutor or curator, and the plaintiff has had a special tutor or curator appointed to defend them in the suit, the service must be made on that curator in person, at his domicile.

C. 56; C. P. 116, 964.

Service on Agent—Nevertheless, if the person absent is an attorney in fact, whose name appears in the petition, the sheriff shall serve the same on that attorney in person, in person or at his domicile.

C. 47; see Art. 245, Constitution 1879, as to service on agent of foreign corporations.

Service of citation on one alleged to be attorney in fact is invalid if he be not such agent.

Farmer vs. Hafley, 88 A. 282.

Or on former agent of dissolved firm.

Conery vs. Rotchford, Brown & Co., 80 A. 682.

Return does not prove agency.

Johnson vs. Brown, 18 A. 884, and cases cited.

Service on agent of defendant is sufficient, provided agency appears in petition.

Pille vs. Kenner, 16 L. 570; Municipality vs. Church, 8 A. 458.

Service on Emancipated Minor—When the suit is brought against an emancipated minor, the sheriff must serve the citation and petition on such minor in person or

at his domicile, unless he is absent from the State, in which case they must be served on the advocate appointed by the judge to defend him.

198. Service on Corporation, Banks, Partners, etc.—When a suit is brought against a corporation, a public institution, or against persons associated in ordinary partnership, the service must be made as follows:

Public Corporations—In suits against the corporation of cities and of other places, on the Mayor in person, or on any other officer exercising similar functions, or in his absence, at the place where he holds his office, by delivery to some of the officers employed there.

Banks—In suits against banking establishments, on their president in person, or at the house where the bank is kept, by delivery to the teller, or, in his absence, to some other officer of the establishment.

Other Corporations—In suits against other civil or religious corporations or public institutions, on their president in person, or at their office, if they hold such in permanence, by delivery to some of their agents.

Commercial Firms—In suits against any commercial association trading under a title or as a firm, on any of the partners in person, or at their store or counting house, by delivery to their clerk or agent.

C. P. 112, 119.

1. Foreign corporations must nominate resident agent who may be cited.

Constitution, Art. 245.

2. Foreign corporation sued through general agent, not mere sub-agents.

Weight vs. Liverpool, London and Globe Ins. Co., 80 A. 1186.

3. And such corporation can not defeat suits by revoking power to agent.

Michael vs. Mutual Ins. Co., 10 A. 787.

4. Authority to receive service of citation must be special.

Rowland vs. Pascal's Executors, 10 L. 598; DeLizardi vs. Pouvezin, 4 R. 898; Dickson vs. Morgan, 6 A. 562.

. And alleged agent's admission is not sufficient evidence of his power to receive citation.

Dawson vs. Landreaux, 29 A. 363.

. Commercial firm:

Service of citation on any one of the firm sufficient.

Montague vs. Weil, 30 A. 52.

Aliter after dissolution of firm.

Michie vs. Brown & Co., 20 A. 75; Anderson vs. Arnette, 27 A. 237; Wilmot vs. Steamer Ouachita Belle, 32 A. 612; Kearney vs. Fenner, 14 A. 870; Galienne vs. Akin, 17 L. 42; Montague vs. Weil, 30 A. 50.

. And where firm had no social name.

Hefferman vs. Brenham, 1 A. 147.

. In particular partnerships, each partner must be cited.

McGehee vs. McCord, 14 L. 362; Billgery vs. Dameron, 18 A. 109; Stevenson vs. Riser, 23 A. 421; LeBlanc vs. Marsoudet, 25 A. 464.

g. Service on Captain or Master of Ship, or Crew—

The suit has been brought against the captain or master of a ship or other vessel, or against some one forming part of the crew of such ship or vessel, having no domicile or residence in the State, the petition and citation must be served either on the defendant in person, or on board of the ship or vessel in which he is employed, or delivery to any person, apparently above the age of sixteen years, belonging to the crew of that ship or vessel.

In suits against owners of vessels who are not captains or masters this article does not apply.

Fellows vs. Lockett, 7 A. 451.

Captain may be served by leaving citation on board, though he may occupy furnished rooms in the city.

Erwin vs. Butler, 5 L. 331.

h. Return of Sheriff—When the sheriff shall notify the defendant of the suit brought against him, in some of the modes above provided, he must make his return in writing, on the back of the original citation delivered to

him, stating in what manner this notification has been effected conformably to the following provisions.

1. Return can not certify waiver of service.

Shannon vs. Goffe, 15 A. 86.

2. False return may be shown in action to annul judgment.

Sloan vs. Menard, 5 A. 212.

201. Returns of Domiciliary Service—If the service was made at the domicile of the defendant by delivery to a third person, the sheriff must state in his return:

1. Where the domicile or the house inhabited by the defendant is situated.

2. The name of the person on whom the service was made; whether such person's name was known to him, or whether he learned it by interrogating that person; or, in the latter case, if the person refused to tell his name, the return must mention that circumstance.

See C. P. 189 and authorities.

Sheriff presumed to know the person whom in his certificate he states he was.

Whiting vs. Haggerty, 5 A. 686.

202. Same—The same formalities which are prescribed in the preceding articles must be observed by the sheriff in serving citations at the office of chartered banks or other public institutions, or at the counting house of commercial establishments, or on board of ships or vessels.

203. Recitals of Return—Signature—The return of the sheriff must state the day, month and year, when the process was served, and be signed by him.

204. Return of Original to Clerk—Immediately after a service of the process, the sheriff must send back to the office of the clerk, from whom he received it, the original citation on which his return has been endorsed,

der that it may be deposited at the office previous to expiration of the delay given to the defendant to file answer.

3. Sheriff Failing to Serve or Make Return, Liable—

—If a sheriff, who has charge of a citation and neglect or postpone serving them regularly, or delay, without good cause, to deliver or to send back the original citation, with his return endorsed, to the office whence issued, he shall be liable for all the loss and damages the party may have sustained through his neglect.

C. 2315.

4. Citation Essential—Citation being the essential part of all civil actions in ordinary proceeding, the neglect of that formality annuls radically all proceedings unless the defendant have voluntarily appeared to answer and answered the demand.

In an execution citation is not necessary in executory proceeding, when the proceedings are *in rem* against the thing thereafter provided.

P. 292, 606, Sec. 4.

No valid judgment except in special cases can be rendered where there is no citation or a citation which is fatally defective.

Miller vs. R. R. Co., 41 A. 37; *Conery vs. Rotchford, Brown & Co.*, 30 A. 692; *Smith vs. Smith*, 17 A. 91; 21 A. 613, 630; 20 A. 75; 15 A. 2; 10 A. 674; 30 A. 140; 30 A. 363.

Cause remanded for citation of necessary parties.

State ex rel. Swing vs. Fontelleu, 30 A. 1122; *Adams & Co. vs. Basile*, 35 A. 101.

Citation invalid if not to person in proper capacity.

McMeyer vs. O'Hern, 39 A. 961.

No technical citation is required.

Where judgment is confessed.

Marbury vs. Pace, 29 A. 557.

Where proceedings are for collection of taxes, published notice to delinquents stands in lieu of citation.

Elder vs. City, 31 A. 500; 10 A. 771; 28 A. 17.

3. Where order of court directing administrator to account is served on him.

Farmer vs. Judge, 81 A. 116.

4. Where it is waived or acknowledged to have been served.

Bartlett vs. Wheeler, 81 A. 541; Fly vs. Noble, 87 A. 667.

5. In proceedings by rule, in settlement of successions and insolvencies, etc.

Isaacson vs. Judge, 84 A. 78.

6. Where oppositions to respite or surrender are made.

Anderson vs. His Creditors, 82 A. 82; Majewski vs. Creditors, 49 A. 94.

(E) Citation waived.

1. By plea to jurisdiction and by plea of *lis pendens*.

City vs. Walker, 28 A. 803.

2. By plea to merits, such as prescription.

Nicholson & Co. vs. Jennings, 27 A. 432.

(F) Want of citation cured.

By appearing in cause for any purpose except—

- (a) To object to citation.

Livingston vs. Dick, 1 A. 523; Tutorship of Heirs of Byland, 88 A. 756; Succession of Baumgarden, 85 A. 120.

And so on appeal.

Id.; City vs. Hall, 21 A. 438.

- (b) To move for bond for costs.

Collier, Tutrix, vs. R. R. Co., 41 A. 87.

- (c) To move to set aside writ of arrest.

Jacob vs. Sartorius, 3 A. 9.

- (d) To appeal.

Marin vs. Thierry, 29 A. 862.

(G) Ex parte orders. Usually invalid when no notice given to parties interested; hence following ex parte orders will be set aside:

1. Order on rule taxing fees of experts.

State vs. Gauthreaux, 85 A. 1168.

2. Order reinstating on docket a suit once dismissed.

Lacroix vs. Bangs, 19 A. 86.

3. Order setting aside a continuance.

Ogden vs. Wilson, 18 A. 596; 3 L. 445.

4. Order dissolving attachment.

Clafin & Co. vs. Lisso & Scheen, 81 A. 172.

5. Order annulling appointment of administrator *pro tempore*.

State ex rel. Duncan vs. Judge, 18 A. 523.

Order by judge *ex proprio motu* making substantial correction or alteration of judgment once entered on minutes.

Miller vs. Chandler, 29 A. 88.

Order homologating provisional account regardless of oppositions.

Wood vs. His Creditors, 35 A. 257.

Order granting alimony to plaintiff.

Madden vs. Fielding, 19 A. 505.

Order of judge reinstating dismissed exceptions or granting new trial.

Culverhouse vs. Marx, 38 A. 668.

Order directing sheriff to pay money.

Bank vs. Payne & Gilman, 21 A. 380.

Order of judge *ex proprio motu* ousting an alleged trespasser on property of vacant estate.

Succession of Townsend, 37 A. 114.

Order putting heirs in possession—particularly collateral heirs.

Dalton vs. Wickliffe, 35 A. 355; Succession of Charnbury, 34 A. 1093; Succession of Allen, 44 A. 801; Succession of Lorenz, 41 A. 1093.

Order directing sheriff to place money in certain bank.

Morris vs. Cain's Executors, 34 A. 665.

Order dismissing opposition and intervention.

Rareshide vs. Enterprise Ginning Co., 42 A. 1195; Ikerd vs. Postlewalte, 36 A. 236.

Order appointing receiver without notice.

Ober vs. Manufacturing Co., 44 A. 572.

Order, rendered out of presence of accused, directing sheriff to take him to another parish to be present at taking depositions of sick witness for State.

State vs. Chambers, 44 A. 603.

Orders which are ex parte may be assailed by rule.

Succession of Thompson, 42 A. 121.

Dies Non, no Citation, Demand, or Proceeding
and on—No citation can issue, no demand can be made, no proceeding had, nor suits instituted, on Sunday, on the fourth of July, on the first or eighth of August, on the twenty-fifth of December, twenty-second

of February, or on Good Friday; nor shall any arrest be made after sunset, on any individual within his domicile.

R. S. 824, 822, 1114; C. P. 287, 818, 762.

1. *Dies non*: By Act 98 of 1892 following and no others are legal holidays: Sundays, the first of January, eighth of January, twenty-second of February, Good Friday, Fourth of July, the first of November, twenty-fifth of December, Thanksgiving Day as designated by President, Mardi Gras and 25th of November in the parish of Orleans, and every Saturday from twelve noon to twelve midnight in cities and towns whose population exceeds one hundred thousand.

See Act 9 of 1890, p. 16.

2. Act 98 of 1892 fixes time for protesting bills and notes maturing on Saturdays, etc.

See also Act 12 of 1876, p. 27.

3. Writs of arrest, attachment, sequestration, provisional seizure and injunction may issue on Sundays and legal holidays.

Act 98 of 1890.

4. When first day of term falls on legal holiday, court opens on first legal day thereafter.

Maskell vs. Horner, 10 A. 641.

SECTION IV.

Of the Conservatory Acts Which May Accompany the Demand.

208. **Provisional Orders**—He who brings action may, in certain cases provided by law, obtain provisional orders, either against the person of his debtor or his property, in order to give effect to the suit which he has brought or intends to institute against him.

C. P. 126.

1. Debtor must be cited and served though arrested.

Wall vs. Wilson, 2 L. 171.

2. Mere informality in petition will not vitiate a legal arrest.

Desha vs. Solomons, 12 L. 272.

Kinds of Conservatory Writs—There are five
 of conservatory acts, to-wit:
 arrest of the debtor.
 attachment in the hands of third persons.
 sequestration.
 provisional seizure.
 execution.

§1.

Of the Arrest of the Debtor.

Arrest—The arrest is one of the means which the
 creditor uses to secure the person of his debtor
 while the suit is pending, or to compel him to give secur-
 ity for his appearance after judgment.

729, et seq.

Who Can Not Be Arrested—Minors, of both sexes,
 married persons, and women, married or single, can
 not be arrested; provided, that emancipated minors, for
 contracts legally contracted by them after emancipation, shall
 not be exempt.

94, 523, 2321; C. P. 1037.

Emancipated minor.

**Emancipated minor may be arrested for debt contracted
 after emancipation.**

Ins. Co. vs. Barroso, 12 L. 412.

Women.

Women can not be arrested in ordinary actions of debt,
 but possibly may when acting *en autre droit*, as tutrix,
 curatrix or executrix.

Mondelli vs. Russell's Executrix, 17 L. 538.

Cause for Arrest and Mode of Obtaining Writ—
 The creditor, whose debtor is about to leave the State,
 or for a limited time, without leaving in it sufficient
 security to satisfy the judgment which he expects to obtain
 in the suit he intends to bring against him, may have the
 person of such debtor arrested and confined until he shall

give sufficient security that he shall not depart from the State without the leave of the court; provided, that no citizen of another State shall hereafter be arrested in this State at the suit of a resident or non-resident creditor, except in cases where it shall be made to appear, by the oath of the creditor, that the debtor has absconded from his residence.

R. S. 87, 524, 8586; C. P. 214.

1. Act abolishing *capias ad satisfaciendum* does not abrogate statute providing for incarceration of debtor for fraud.
Miltnerberger vs. Burgess, 15 A. 8; Gottschalk vs. Meyer 28 A. 885.
2. Acts granting right to arrest must be strictly construed.
Levi & Navra vs. Levy, 20 A. 552.
3. A writ of arrest may be obtained on a claim for damages arising *ex delicto*, when amount is certain.
Block vs. Bannermann, 10 A. 1; Canal Bank vs. Schroeder, 7 A. 615;
Wilder vs. Bush, 7 A. 657
4. Agent can not take the oath above provided; creditor himself must make it.
Merritt, Bliss & Co vs. Openheim, 9 A. 54.
5. Arrest for fraud is a civil remedy.
Thompson vs. Chapman, 7 A. 269; Martin vs. Chrystal, 4 A. 345.
6. Foregoing proviso applies only to citizens of another State of this Union—not to foreigner.
Bank vs. Schroeder, 7 A. 615; Tallaman vs. Cardenas, 14 A. 514.
7. Word "residence" refers to last place of residence.
Hand vs. Tallaferro, 1 A. 26.
8. Partner may arrest debtor of the partnership.
Brodnax vs. Thomason, 1 A. 882.
9. Debtor leaving State, even for a limited time, may be arrested and held to bail.
Henshaw vs. Ladd, 8 L. 513.
10. Affidavit need not state where defendant resides.
Hanney vs. Boehner, 14 A. 872.
11. Intention to leave State easily presumed in cases of fraudulent disposition of property.
Hudson's Case, 2 M. 172.

213. Writ Allowed for Debt or Damages—Such arrest may be ordered in all demands brought for a debt,

whether liquidated or not, when the term of payment has expired, and even for damages for any injury sustained by plaintiff in either his person or property.

C. P. 244.

4. Affidavit and Bond—Previous to obtaining an order of arrest against his debtor to compel him to give sufficient security that he shall not depart from the State, the creditor must swear, in the petition which he presents for that effect to any competent judge, or in an affidavit taken at the foot of or annexed to the same, that the debtor owes the damages which he claims, and the amount of which he specifies, is really due to him, and that he verily believes that the defendant is about to remove from the State permanently, without leaving in it sufficient property to satisfy his demand; and that he does not take this order with the intention of vexing the defendant, but only in order to secure his demand.

The creditor, his agent or attorney in fact, praying such order, must, besides, annex to his petition his obligation in favor of the defendant for a sum exceeding by one-fifth the amount of that which he claims, with the surety of a good and solvent person, residing within the jurisdiction of the court, as a security for the payment of such damages as the defendant may recover against him, in case it should be decided that the arrest was wrongfully made.

S. 93, 95, 96, 524, 526, 527, 3533; C. P. 244, 212, 245, 276, 287, 1097, 1109, 221.

Bond and affidavit required in all cases of arrest.

Graham vs. Noble, 19 A. 512.

Creditor must swear positively to existence of debt, but may swear that he verily believes that defendant is about to leave, etc.

Herwig vs. Beach, 15 A. 261.

In injunction entire affidavit may be "to best of knowledge and belief."

Jewell vs. Jewell, 1 R. 317.

4. Surety. Bound by judgment against debtor.

Keane vs. Fisher, 10 A. 261; Gottschalk vs. Meyer, 28 A. 886.

5. Damages.**(a) Malice presumed from want of probable cause in arrest.**

King vs. Dittrich, 28 A. 243; Letzler vs. Huntington, 24 A. 330.

(b) Where no malice, no vindictive damages allowed.

Gourgues vs. Howard et als., 27 A. 340.

(c) But actual damages may be proved and allowed without malice.

Perrin vs. Blanchard, 15 A. 183; Phillips vs. Bonham & Iven, 16 A. 337; Rogay vs. Juillard, 25 A. 307; Wentz vs. Bernhardt, 27 A. 687.

(d) Dissolution of writ of arrest is *res judicata* on question of right to actual damages.

Barrimore vs. McFeely, 52 A. 1182; Block vs. Meyers, 35 A. 220; Roos vs. Goldman, 36 A. 133.

(e) Counsel fees. Fees of attorney for procuring dissolution of writ are allowed as damages.

Roos vs. Goldman, 36 A. 133.

But not fees for prosecuting damage suit.

Chapin vs. Waterman, 34 A. 61.

6. Suit for damages premature. Suit for damages premature before final termination of the main suit unless the illegality of arrest finally established by appeal.

Wentz vs. Bernhardt, 27 A. 688; citing 15 A. 421; 16 A. 3; 35 A. 220.

7. Probable cause. Probable cause saves damages.

Hopkins vs. Garthwaite, 38 A. 325.

215. Oath—by Whom Taken—The oath prescribed in the preceding article may be taken either by the creditor himself, or, in his absence, by his attorney in fact, or his agent.

1. Affidavit can not be made by agent when principal is present.

Wimblish vs. Wade, 21 A. 181.

2. Except possibly when principal is sick.

11 A. 274.

3. Absence of principal and fact of agency need not be sworn to; may be proved subsequently.

Schneider vs. Verckner, 11 R. 274.

6. Oath—Before Whom Taken—Terms—The oath which the creditor is required to take, of the existence and amount of the debt, of which he claims payment, in the manner provided in the two preceding articles, may be taken before any judge or justice of the peace, or clerk of the court before which he sues, or before the judge of any other place, provided the signature of such judge be signed or duly authenticated.

And in all cases when, by any provision of this Code, the oath of a party is required, it may (in case of the absence of said party) be made by his agent or attorney; and in such case it shall be sufficient for the agent or attorney to swear to the best of his knowledge and belief.

R. S. 97, 98, 130, 529, 2567, 2568; C. P. 244, 276; R. S. 528.

Up to 1838, at least, agent was required to have personal knowledge of existence of debt.

Sanford vs. Pyne, 13 L. 304.

7. Id., Applies to All Provisional Writs—The above provision governs in all cases where the oath is taken by the debtor or attorney of the creditor to obtain the attachment of the hands of third persons, the provisional seizure, or the sequestration of the debtor's property, or in order to have the debtor enjoined not to dispose of the same while the attachment is pending.

R. S. 245, 276, 287, 304, 1110, 1117; R. S. 397, 528, 529, 2567, 2569.

An attachment sworn to before any other officer, though competent to administer oaths, will not support the writ.

Tallant vs. Thompson & Musselman, 4 N. S. 514.

8. Discharge of Debtor by Disproving Allegations—A debtor who has been arrested and held to surety may be discharged by proving to the judge, either in court or at his chamber, after having given notice to the plaintiff of his intended application, that the facts

stated by the plaintiff in order to obtain his arrest are not true; but the plaintiff shall be allowed to support them by other testimony.

See *Levi & Navra vs. Levy*, 20 A. 552.

(A) Debtor may be discharged.

1. By disproving the alleged facts.

O. P. 218.

2. By giving bond or note secured.

O. P. 219, 222.

3. By making a surrender of his property, when no charge of fraud is pending.

O. P. 219.

4. By placing in sheriff's hands sufficient property to satisfy prospective judgment.

O. P. 220.

(B) Debtor may not be discharged merely by:

Confessing judgment.

State ex rel. *Wung Chung vs. Sheriff*, 81 A. 799; *Anderson vs. Brinkley*, 1 A. 126.

(C) Debtor arrested after judgment must be discharged.

Thornhill vs. Christmas, 10 E. 548.

219. Discharge by Bond or Surrender—The defendant may also be discharged by giving to the sheriff his bond for a sum exceeding by one-fourth that which is demanded, with the security of one good and solvent person, conditioned that he will not depart for the term of three months; and that in case he should depart before the expiration of such time, or without leave of the court, the said security shall pay to the sheriff the amount for which definitive judgment shall be rendered in the cause.

When arrested on a charge of fraud, the condition of the bond shall be, that if the fraud complained of be established, the security shall be liable for the debt due the complaining creditor, in case the debtor shall have departed from the State without leave of the court.

Any debtor who may be imprisoned under a writ of arrest, and against whom no charge of fraud is pending,

to be discharged from arrest, by making a surrender of his property to his creditors.

5, 86, 102; C. P. 1106.

Discharge by Deposit of Property—The defendant may be discharged likewise by placing in the hands of the sheriff property of sufficient value to satisfy the demand of the plaintiff's demand, in case judgment should be rendered against him.

1065.

Arrest on Unmatured Obligation—Even when the debt is not yet due, if the debtor be about leaving the State, the creditor may have such debtor arrested, if he make an affidavit above prescribed, adding, that he verily believes that the debtor is about to depart with the intention to defraud his creditors, and setting forth specially the circumstances on which that belief is grounded; but the defendant will always be allowed to disprove such allegations above provided.

44, 248, 214.

This article does not refer to debtors who were non-residents at the time the debt was contracted.

Armistead vs. Sanderson, 1 R. 176.

Discharge of Debtor Arrested When Obligation Matured—The defendant thus arrested may be discharged by giving his note or obligation to the sheriff for a sum not exceeding by one-fourth the sum due to the creditor at the time he has been arrested, with the security of one good solvent person, that he shall appear when the debt shall become due and judgment shall have been rendered in his favor, the same, and that, on his failing to appear, the security shall be bound to pay the amount of said judgment.

108.

108.

The plaintiff may sue on this obligation, in case defendant absconds, by appointing curator *ad hoc*.

Loughery vs. Crooks, 5 A. 486.

223. Arrest After Surrender—When—A debtor, though he has called a meeting of his creditors in order to make a surrender of his property, and has obtained a stay of proceedings against his person or property, may, nevertheless, be arrested if one or more of his creditors declare, on oath, before the court in which the failure took place, that he or they verily believe that such debtor intends departing from the jurisdiction of the court to secrete his person from his creditors; provided they set forth, specially, the circumstances which have induced them to form such a belief.

This article refers to arrest for debt simply and does not repeal or conflict with law providing for arrest of applicant for benefit of insolvent laws.

Figliere vs. His Creditors, 11 A. 557.

224. Discharge—A debtor arrested pursuant to the provisions of the preceding article, may be discharged by disproving the charge brought against him, or by giving to the sheriff his obligation for such sum as shall be determined by the judge, with the security of one good and solvent person, that he shall not leave the limits of the jurisdiction of the court until after the surrender of his property shall have been accepted by his creditors or duly homologated, and the property surrendered by him delivered.

C. P. 1108.

Debtor entitled to summary trial by rule to dissolve arrest.

Gardner vs. O'Connell, 5 A. 554.

225. Sheriff Taking Obligation Returns It to Clerk—When the sheriff takes an obligation with a surety in any of the cases specified in the preceding articles, he must immediately return such act to the office of the clerk of the court where the suit is pending, in order that it may be communicated to the plaintiff.

. Twenty Days Allowed to Except to Security Re-

l—If no exception be taken by the plaintiff to the validity of the security taken by the sheriff within ten days after said act is so returned, no such exception shall ever after be allowed, and the act of surety shall be assigned by the sheriff to the plaintiff.

. Rule on Sheriff to be Made Personally Liable—

If within twenty days after the act shall have been returned by the sheriff to the office of the clerk of the court, the plaintiff except to the surety accepted by the sheriff, as being solvent and sufficient, said plaintiff must move the judge of the court, or he may make his exceptions before the judge in chambers, calling on the sheriff to show cause, ten days after being notified of the same, if such plaintiff reside in the parish where the court is held, why he should not be made liable, personally, to the plaintiff, for the debt in the same manner as the security accepted by the said sheriff would have been, had he been good and sufficient.

S. 99, 530, 8780.

. Where Such Sheriff Resides in Other Parish, Proper

Allowed—In case such sheriff should reside in another parish, the judge shall give such delay as he may think sufficient to enable him to appear and answer the return granted against him, as above stated.

. Sheriff Bound Personally if Security Insufficient—

At the expiration of this delay, the court shall decide on the validity of the exception taken by the plaintiff, and if the security received by the sheriff be pronounced good and sufficient, the court shall adjudge him to be liable to the plaintiff in the same manner as the security properly received by him would have been.

Discharge of Surety—When—One who has been bound by surety that another shall not depart the State, or

leave the jurisdiction of the court by which the order of surety was granted, and that he will appear to answer to the judgment, may be discharged from all responsibility by surrendering to the sheriff the person of the debtor whom he had arrested.

R. S. 89, 95, 91, 362, 368, 364, 365; C. P. 730.

1. Surety also discharged by death of debtor.

Frey vs. Hebenstreit, 1 R. 565.

2. Bail may coerce surrender of principal.

Fisk vs. Comstock, 2 R. 25.

231. Surrender by Surety at Any Time—Such surrender of the person of a debtor may be made in every stage of a cause, previous to judgment having been rendered against the surety, as hereafter provided.

C. P. 735.

1. Even after stay of proceedings ordered and out of the State.

Ex parte Lafonta, 2 R. 495; *Henderson vs. Lynn*, 2 M. 57.

2. But *quære*, whether this applies since the act of 1840.

See *Lindley vs. Hagens*, 11 R. 204.

232. Steps Necessary to Release Surety—The sheriff to whom the person of a debtor is so surrendered, must deliver to the surety a certificate of his having so surrendered the person of the debtor, and on producing such a certificate to the court, after due notice having been served on the defendant, the surety may, on motion, have the act of surety executed by him canceled.

233. Arrest of Debtor by Surety—If one who has become surety for a debtor in any of the cases above mentioned, wish to be discharged of such surety by surrendering his person, and such debtor refuses to go voluntarily to be so surrendered, or attempt to leave the State or the jurisdiction of the court without his consent, such surety may have the debtor arrested in order to surrender him to the sheriff, by petitioning and obtaining the order of

to that effect; provided he annex to his petition a true copy of the act by which he became surety.

88, 91, 362, 363, 364, 365.

1. In Case of Cession—If the debtor has failed to obtain a stay of proceedings against his person or property, the surety may, nevertheless, have him arrested in the manner provided in the preceding article.

Judgment Against Surety—But if the surety fail to appear at the person of the debtor on execution of the judgment rendered against him, the plaintiff is entitled to judgment against such surety for the amount of the judgment rendered against the debtor, by the court before which it was rendered, or before the court by which it was rendered, or by the act of surety transferred to him by the court. Provided written notice of the intended motion be served on such surety ten days previous to taking judgment against him; and said surety shall be tried summarily, and without the intervention of a jury, unless he shall allege and swear that the signature to the bond, purporting to be his, is false, or that the judgment has been satisfied.

581, 8781.

Surety's Liability Measured by Judgment Against Debtor—Judgment can only be rendered against the surety for the amount of the sum for which he became surety. It is the same as that given against the debtor.

If the debtor be condemned to pay more, judgment will be annulled.

Gray vs Praeger, 34 A. 54; Florat vs. Handy, 35 A. 816.

At What Time Arrests May Be Ordered—**Petition Filed Next Day**—A creditor may have his debtor arrested when such debtor is about leaving the State, at the moment of instituting his action, while it is pending at every stage of the proceeding, and even after ap-

Attachments, Arrests and Sequestration Issue in Affidavit and Bond—And in all cases where attachments, arrests, and sequestration are demandable, the plaintiff, his agent, or attorney having made affidavit and given bond, in conformity to law, and having filed the same in court, and obtained the order of the judge for the issuance of the writ, it shall be the duty of the clerk to issue, forthwith, the same, without any petition being then presented; but the usual petition shall be filed on the day succeeding that on which the said process shall have issued, except in cases where a Sunday, Good Friday, First of January, Eighth of January, Twenty-fifth of December, or Twenty-second of February, or Fourth of July, shall be the succeeding day; then, on the day next succeeding such day of public rest; and the sheriff shall proceed immediately to execute said process according to law.

R. S. 101, 524, 522, 525, 1114; C. P. 207, 276, 289, 269, 284, 296.

By Act 14 of 1880 conservatory writs may issue the day before petition is filed, provided affidavit, bond and order is filed.

See Act 98 of 1892 for Legal Holidays.

238. No Arrest Except in Cases herein provided—No debtor can hereafter be arrested, and held to surety, all laws to the contrary notwithstanding, except in the cases above provided.

C. P. 729, *et seq.*

§ 2.

Of Attachments in the Hands of Third Persons.

239. Attachments—An attachment in the hands of third persons, is a mandate which a creditor obtains from a competent judge, commanding the seizure of any property, credit, or right, belonging to his debtor, in whatever hands they may be found, to satisfy the demand which he intends to bring against him.

C. P. 287.

ent judge:

ks of court may issue writs in absence of judge, shown
fidavit.

106 of 1880.

in his absence his chief deputy.

Act 43 of 1882, p. 54; Act 75 of 1884, p. 97; Act 187 of 1888, p. 195.

re of defendant's domicile alone competent when writ
rely conservatory remedy.

hereau vs. Guldry, 24 A. 311; Smith vs. Durbridge, 26 A. 581;
radley vs. Woodruff, 26 A. 299; Guyol vs. Dugan, 26 A. 529; Gay
Eaton, 27 A. 166.

When action is purely *in rem* court where property
s situated issues writ, and judgment has no effect
except upon property seized.

Page vs. Generes, 6 A. 549.

And first court attaching may send attachment pro-
cess to different parishes.

Kahn & Bigart vs. Sipili, 81 A. 1039; overruling Favrot vs. Delle,
Piano, 4 A. 584.

o garnishee. Judge of main defendant's domicile may
garnishment to issue to resident of another parish
such garnishment accompanies attachment, but he
ot under a *fi. fa.*

queeze vs. LeBlanc, 29 A. 194; Smith vs. Durbridge, 26 A. 581.

d under a judgment and *fi. fa.* from another court,
ourt of garnishee's domicile will order garnishment.

Featherstone vs. Compton, 8 A. 880.

r of attachment necessary.

lee vs. Cocke, 18 L. 482; Erwin vs. Commercial Bank, 8 A. 186.

g petition on succeeding day, when writ issues before
on filed, is absolutely necessary.

oy vs. Kenley, 8 L. 17.

icting seizures:

t court attaching has jurisdiction.

State ex rel. Newman vs. Burke, 35 A. 188.

may attach:

United States Government.

U. S. vs. Murdock, 18 A. 898. See 7 A. 185, 11 R. 418, 8 R. 262, 5 R. 120.

Agent, with power to sue on claim, may make affi-
avit and bond.

Allen, Nugent & Co. vs. Champlin, 82 A. 511; De Porat vs. Gusman,
80 A. 988; Dwight vs. Weiss, 6 A. 706; Fulton vs. Brown, 10 A. 860.

Political corporation, such as city.

New Orleans vs. Gauthreaux, 82 A. 1126.

8. Who may not attach:

(a) Judgment creditor.

Frellson, Stevenson & Co., vs. Stewart, 14 A. 844.

(b) Creditor of a succession, who can not thus obtain advantage over others.

Levy vs. Succession of Lehman, 38 A. 9; Levy vs. Mayo, 77 A. 556; Boyce vs. Escoffier, 2 A. 578; Oheatham vs. Carrington, 14 A. 696; Trimble vs. Brechts, 10 A. 778.

But where debtor was alive when attachment executed.

See Manning's U. C., p. 359.

9. Alias writ. Where first writ abandoned, there must be new affidavit, order and bond for alias writ.

Erwin vs. Bank, 8 A. 186; Erwin vs. Bank, 12 R. 227.

10. Seal:

Writ must have seal of court, order need not.

Sellgman & Co. vs. Elgmaiden & Co., 37 A. 724.

11. Conditions existing at time attachment obtained control.

Thus attachment will be:

(a) Maintained when debtor's intention was fraudulent when writ was issued, but appear honest afterwards.

Boyd vs. Labranche, 85 A. 286; Leathers vs. Cannon, 27 A. 522.

(b) Dissolved when creditor only became such after writ is executed.

Bank vs. Moss & Co., 41 A. 229.

(c) Maintained when grounded on permanent departure of defendant fortified by circumstances, notwithstanding subsequent return.

N. O. Canal Co. vs. Comly, 1 R. 281; Reeves vs. Comly, 3 R. 363; Offut vs. Edwards, 9 R. 90.

12. Party in whose hand property of debtor is found is proper person to serve seizure on.

Grieff & Byrnes vs. Betterton, 18 A. 349.

13. Rights of attaching creditor are not fixed until recognized by judgment. Hence he can not prior thereto compel depository to turn over property to sheriff.

Mesheew vs. Gould, 30 A. 163.

14. Subsequent attaching creditors may intervene and oppose validity of first attachment.

Claffin & Co. vs. Feibleman & Co., 44 A. 513.

Causes for Attachment—A creditor may obtain attachment of the property of his debtor, in the following cases:

Permanent Departure—When such debtor is about to depart permanently from the State, without there being any legal proceeding against him, in the ordinary course of judicial proceedings, of obtaining or executing judgment against him, or when such debtor has already departed from the State permanently.

Non-Residence—When such debtor resides out of the State.

Concealment to Avoid Service—When he conceals himself to avoid being cited and forced to answer to the writ of attachment intended to be brought against him.

Fraudulent Mortgage, Assignment and Disposition of Property—When he has mortgaged, assigned or disposed of, or is about to mortgage, assign or dispose of his property, rights or credits, or some part thereof with intent to defraud his creditors or give an unfair preference to any of them.

Fraudulent Conversion in Money, etc.—When he has converted, or is about to convert, his property into money, or the proceeds of debt, with intent to place it beyond the reach of his creditors.

108, 109, 532; C. C. 1969; C. P. 243, 1116.

Act of 1877, extra session, gives right to attachment for causes, in suits before justices of the peace.

Attachment falls when any of above grounds are alleged but not proved.

Ex parte Landry, 24 A. 82.

Attachment maintained where grounds for attaching are proved.

Ex parte Croslin, 24 A. 128; Abrams vs. Teague, 24 A. 567.

Plaintiff must prove fraudulent intent.

Ex parte Weiss, 24 A. 269; Calhoun vs. McKnight, 44 A. 399; Rawlins vs. Sherwood, 45 A. 67.

(E) Intention existing at time of act complained of, not subsequent intention, controls.

Bank vs. Moss, 41 A. 281; *Blanchard vs. Grousset*, 1 A. 38.

(F) Permanent departure.

1. Intention to be absent permanently must exist.

Clark vs. Pratt, 19 A. 102; *Schorten vs. Davis*, 21 A. 173; *Winter Works vs. Toy*, 12 A. 200; *Gordon vs. Baillio*, 18 A. 473.

2. Acts and declarations of party are evidence of his intention.

Rhodes vs. Meyers, 16 A. 336; *Leathers vs. Bell*, 27 A. 523.

3. Even when made out of plaintiff's presence.

Offut vs. Edwards, 9 R. 90.

4. Acts weigh more than declarations.

Henderson vs. Travis, 6 A. 174.

5. Subsequent return no evidence that original intention was not to be permanently absent.

Simons vs. Jacobs, 15 A. 425; *Reeves vs. Comly*, 8 R. 363; 1 R. 231.

(G) Who may be attached.

1. Foreign corporation.

Hazard vs. Agricultural Bank, 11 R. 526; *Martin, Pleasants & Co. vs. Bank of Alabama*, 14 L. 415; *Life Association vs. Levy*, 33 A. 1203.

2. Respited debtor.

State ex rel. Williams vs. Judge, 42 A. 73; *Poquet vs. Golls*, 1 N. S. 439; 15 A. 19.

But it appears that the process must be for the mass of creditors and must be preceded by a demand for the nullification of the respite order.

Mitchell vs. Dalton & Williams, 44 A. 97; *Andrus vs. His Creditors*, 45 A.

3. Debtor absconding, though leaving co-debtor liable in solido, who is perfectly solvent.

Maxwell vs. Gunn, 2 N. S. 140.

(H) Non-resident.

1. Attachment lies in every case where defendant is non-resident, even if plaintiff have mortgage.

Sandel vs. George, 18 A. 526; *De Poret vs. Gusman*, 30 A. 934.

2. And even when non-resident debtor is present in the State.

Id., citing 1 N. S. 412; *McKowen vs. McGuire*, 15 A. 637; *Sandel vs. George*, 18 A. 526, 305.

And even if he have a commercial domicile here.

Rayne vs. Taylor, 10 A. 726.

Residence *animo manendi* within the State for any length of time prevents attachment on ground of non-residence.

Lury vs. Skilton, 19 A. 136; but see State vs. Judge, 2 R. 461; citing 14 L. 169; Boone vs. Savage, 7 L. 476; See 15 A. 687.

Attachment against absentee not a conservatory process; it is main action, and dissolution is dismissal of suit.

Watson vs. Simpson, 15 A. 709.

Effect of judgment against non-resident.

Judgment in attachment against non-resident is purely *in rem* and binds only the property attached.

Herber vs. Abbott, 89 A. 112; George vs. LeGrand, 8 A. 652 Favrot vs. Delle Piano, 4 A. 586; Succession of Durand, 24 A. 852; Pennoyer vs. Neff, 95 U. S. 714; Broughton vs. King, 2 A. 571; Thayer vs. Tudor, 2 A. 1018.

But where non-resident defendant appears to bond attached property, he submits himself to jurisdiction *in personam*, and judgment may be rendered against him.

Rathbone vs. Ship London, 6 A. 441.

Attachment ordinarily is sole remedy against absentee.

ughlin vs. Ice Co., 85 A. 1184; Overruling 19 A. 86; 29 A. 821.

No evidence of change of domicile.

ere voting in other place.

Mandeville vs. Huston, 15 A. 282.

Original domicile retained until new one acquired.

Anderson vs. Ralston, 20 A. 812; Walden vs. Canfield, 2 R. 466.

Partnership as non-resident.

Partnership domiciled in another State and having an establishment here can not be attached here as non-residents for a partnership debt.

Monroe vs. Frosh, 2 A. 962.

And even when the partnership is outside of State but one partner resides here.

Shirley, Escott & Co. vs. Steamer Bridge, 5 A. 260.

But interest of partner may be attached here.

Frazer & Co. vs. Thorpe, 9 A. 518; Barriere & Co. vs. McBean, 12 A. 493, Taylor vs. Kehlor, Updike & Co., 28 A. 580; Frost vs. White, 14 A. 140.

Attachment void in part, void in toto.

When boat attached belongs to a resident and non-residents as commercial partners, attachment set aside entirely.

Converse vs. Lucy Robinson, 15 A. 484.

(O) *Fraudulent assignment, disposition or mortgage of property justifies attachment.*

Ross vs. Williams, 24 A. 568; *Zuberbier & Behan vs. Prudhomme*, 34 A. 1049; *Wetherow vs. Croalin*, 24 A. 128; *Goodwell & Webb vs. Minchew*, 26 A. 621; 42 A. 864.

1. Granting a mortgage with no fraudulent intent is no ground for attachment.

Abney, Love & Co. vs. Whitted, 28 A. 818.

2. Sales in usual course of business not objectionable as fraudulent, even when debtor is insolvent.

Hernsheim & Bro. vs. Levy, 32 A. 340.

(P) *Under Act 46 of 1886, the direct seizure of property so fraudulently transferred is permitted either under mesne or final process, and the seizing creditor may allege and prove simulation or fraud in the transfer. Former jurisprudence changed.*

See *Redwitz vs. Waggaman*, 33 A. 26.

Except where sale was pure simulation, property could not, under former jurisprudence, be seized.

Lefevre vs. Landry, 24 A. 62.

(Q) *Intent to defraud.*

1. Fraudulent intent must exist; appearances are not sufficient.

Ferguson vs. Chastant, 35 A. 339; *Abney vs. Whitted*, 28 A. 818; *McFarland & Dupre vs. Lehman, Abraham & Co.*, 35 A. 624; *Seligman & Co. vs. Elgmaiden & Co.*, 37 A. 722.

2. Where such intention exists attachment is justified.

Newman vs. Kralme, 34 A. 910.

3. Unfair preferences to one creditor and misrepresentations to others justify attachment.

Stevens vs. Helpman, 29 A. 635.

4. But when preference is allowed by law, as in favor of wife, no attachment lies therefor.

Wilson vs. Chalaron, 26 A. 641.

5. And where attaching creditor himself sought preference, he is estopped.

Seligman & Co. vs. Elgmaiden & Co., 37 A. 722.

(R) *Mitigation of damages.*

1. Appearances of fraud.

Ferguson vs. Chastant, 35 A. 339.

2. Advice of counsel.

Decoux vs. Lieux, 33 A. 392.

den of proof.

On rule to dissolve on ground that allegations were untrue, plaintiff must prove them.

Hermann & Vignes vs. Amedee, 80 A. 594.

But affidavit for attachment makes *prima facie* proof.

Walker vs. Barelli, 82 A. 467.

Specific act of immorality distinct from fraud charged will not substantiate the charge.

Ball, Lyons & Co. vs. Lignoski, 24 A. 484.

What Property May Be Attached—A creditor in the like manner, obtain a mandate of seizure against things of property belonging to his debtor, real or personal, whether it consists of credits, or rights of action, and whether such property be in the debtor's possession or in the hands of third persons, by whatever title the same be held, as deposit or placed under their custody.

284, 643.

What property may be seized in attachment: C. P. 642.

Boat, notwithstanding sale of part interest; interest of debtor may be seized.

Stevenson vs. Prather, 28 A. 484; Owen vs. Davis, 15 A. 22; Sibley, Gulon & Co. vs. Fernie Bros., 22 A. 163; but see contra Converse, Kennett & Co. vs. Steamer Lucy Robinson, 15 A. 484, citing 2 A. 962; 5 A. 262; 18 A. 290; 10 A. 726; Nimmick, McCloskey & Co. vs. Tehuantepec Co., 16 A. 46.

Funds in hands of third person belonging to debtor even after order to pay over to some one else before notice to such third person.

Robertson, Hudson & Pulliam vs. Scales & Gibson, 15 A. 545; St. Romes vs. Cotton Press, 21 A. 292; Hill vs. Hanney & Co., 15 A. 654; Golson & Co. vs. Powell, 82 A. 523; Fall vs. Darden, 17 A. 286.

Personal property, such as cotton, while in hands of debtor, though sold to third person.

Banker & Co. vs. Brady, 26 A. 749.

(a) Where debtor may sell, his creditor may attach. Before delivering to third person, property liable to attachment by debtor's creditors.

Delop & Co. vs. Windsor & Randolph, 26 A. 186.

(b) Delivery to carrier is delivery to consignee.

Chaffe vs. Heyner, 81 A. 594.

(c) Provided consignee accepts.

Act 66 of 1874; Choppin vs. Clark, 81 A. 847.

4. Notes due debtors before endorsement and delivery.

Hill vs. Hanney, 15 A. 655; Lassiter vs. Russy, 14 A. 699.

- (a) Notes and judgments must be actually seized by taking physical possession unless attaching creditor garnishee the debtor in note or judgment.

Gaines vs. Merchants' Bank, 4 A. 369; Anderson vs. Valentine, 15 A. 379, citing 14 L. 449, 514; 4 A. 369, 187; 3 A. 390, 196; 2 A. 333, 735, 910; 7 R. 500; 6 R. 345.

- (b) *Aliter*, where note or draft is in *custodia legis*, interrogatories on clerk sufficient.

Mill vs. Hebert, 19 A. 59; Ealer vs. McAllister, 14 A. 334; but see Daley vs. Cunningham, 3 A. 55.

- (c) Mere notice to clerk without citation and interrogatories insufficient.

Woodworth vs. Lemmerman, 9 A. 524.

5. Judgment, even when such judgment be against attaching creditor.

Richardson vs. Gurney, 9 L. 235; Bank vs. Hancock, 35 A. 43; Grayson vs. Vleche, 12 M. 633.

- (a) But had the judgment expressly recognized the deposit, it would seem it could not have been seized, as that would be a virtual plea in compensation.

Purvis, Wood & Co. vs. Breed, 7 A. 637.

- (b) Notice to judgment debtor sufficient.

Hanna vs. Bry, 5 A. 651.

6. Draft or note itself must be seized; copy will not suffice.

Scott vs. Niblet, 6 A. 132.

And note transferred to debtor will not be seizable until he accepts said transfer.

Dunbar vs. Dinkgrave, 10 A. 545.

7. Fees due officers of private corporations, *e. g.*:

- (a) Liquidating commissioner of bank.

Conrey vs. Copeland, 4 A. 307.

- (b) Auditor of succession accounts.

Vance vs. Lafferanderie, 4 R. 340.

8. All seizable property of debtor in possession of third person under simulated title.

Bowman vs. McElroy, 15 A. 663.

- (a) And since Act 46 of 1886 creditors may seize, either by mesne or final process, property of debtor in third hands under titles simulated or fraudulent. Former jurisprudence sanctioned the seizure only when the title was a pure simulation.

(b) Seizure under attachment does not affect title claimed by third persons.

Bank vs. Williams, 43 A. 418.

Leased property, subject to lessor's lien.

Case vs. Kloppenburg, 27 A. 482; Pickens vs. Webster, 81 A. 870; Horner vs. Dennis, 84 A. 880.

at property may not be seized in attachment. C. P. 644.

Rights in a suit after subrogation in open court in favor of another person after notice.

McDaniel & Co. vs. Gardiner, 84 A. 841.

Fees of office due to public officer.

Dunbar vs. Dinkgrave, 10 A. 545.

Interest of partner in a particular piece of partnership property. His entire interest in partnership may be seized and sold, subject to prior partnership claims.

Alexander vs. Burns, 6 A. 704; Levy vs. Mayo, 27 A. 556; Pittman & Barrow vs. Robicheau, 14 A. 110; Marston vs. Dewberry, 21 A. 518; Carwin vs. Bates, 10 A. 757, citing 8 A. 519, 593; 11 R. 186. Also see 11 A. 705; 5 A. 538; 9 A. 518; 12 A. 498; New Orleans vs. Gauthreaux 82 A. 1126.

Taxes due State or municipalities.

Egerton vs. Municipality, 1 A. 485; Municipality vs. Hart, 6 A. 570; 85 A. 558; Wood vs. Board of Liquidation, 40 A. 408.

Public property, such as court houses, etc.

Police Jury vs. Michel, 4 A. 84.

Any property brought by force or fraud within the jurisdiction of the court for the purpose of being attached.

Myers vs. Myers, 8 A. 870; Powell vs. McKee, 4 A. 108; Wingate vs. Wheat, 6 A. 241; Paradise vs. Bank, 5 A. 711.

Interest of heir in a particular piece of succession property. His whole interest in estate should be seized.

Boisse vs. Dickson, 81 A. 742; 4 A. 295; Mayo vs. Stroud, 12 R. 105; Noble vs. Nettles, 8 R. 152; Ternant vs. Boudreaux, 6 R. 488.

All property exempt by law from seizure. But no property exempt from seizure against a non-resident or absconding debtor.

Lambeth vs. Milton, 2 R. 81.

Property fraudulently and illegally in possession of debtor.

Galbraith vs. Davis, 4 A. 95; Gasquet vs. Johnston, 2 L. 514; Parmele vs. McLaughlin, 9 L. 486; see also 8 L. 252; 15 L. 850.

Debt—The property of a debtor may be attached in the hands of third persons by his creditor, in order to the payment of a debt, whatever may be its nature,

whether the amount be liquidated or not, provided the creditor, his agent or attorney in fact, who prays for the attachment, state expressly and positively the amount which he claims.

R. S. 104, 538, 2539; C. P. 217.

Nature of Debt. Debt must be Absolute and Certain.

(A) *Absolute nature of the debt as to amount.*

1. No attachment. Where amount of debt can not be fixed with certainty, as:

(a) Claim for damages arising *ex delicto*.

Prewitt vs. Carmichael, 2 A. 948; West vs. Chew, 18 A. 630; Childs vs. Wilson, 15 A. 512; 12 R. 110; Young vs. Ship Princess Royal, 22 A. 399; Grimes vs. Prendergast, 8 A. 376; Holmes vs. Barclay, 4 A. 63; Swager vs. Pierce, 8 A. 435; 24 A. 268.

(b) Claim by one partner against another.

Brinegar vs. Griffin, 2 A. 154; Barrow vs. McDonald, 12 A. 110.

2. Actions for damages for breach of contract, resting upon certain elements, may be accompanied by attachment.

Hyde and Mackie vs. Higgins, 15 A. 51; Crane vs. Lewis, 4 A. 520.

(B) *Certainty of debt. Where existence of debt is uncertain, no attachment lies, as:*

1. Attachment against drawer of a bill before maturity, though acceptor has become insolvent.

National Bank vs. Moss & Co., 41 A. 229; Denegre vs. Milne, 10 A. 524; Read vs. Ware, 2 A. 498; Shannon vs. Langhorn, 9 A. 526; Price vs. Risley, 13 A. 526; Johnson vs. Flanagan, 26 A. 689.

2. Attachment by one partner against another before a settlement has fixed respective claims of each and where nature of the business necessarily renders such claims indeterminate.

Brinegar vs. Griffin, 2 A. 154; Levy vs. Levy, 11 L. 581.

3. *Aliter*, where partnership existed for a limited or particular enterprise and profits or interest or part interest of one is susceptible of easy calculation.

Belden vs. Read and Hunt, 27 A. 103; Flower vs. Griffith's Heirs, 12 L. 846.

243. Petition—Affidavit—A creditor wishing to have the property of his debtor attached, must demand it in a petition presented to a competent judge, and to obtain the

ence of such attachment it shall be sufficient for the
 tor to swear to the existence of the debt demanded
 m, and that he verily believes that the debtor has left
 State permanently, or is on the eve of leaving the
 permanently, or that he resides out of the State, or
 eals himself, so that citation can not be served on
 or that he has mortgaged, assigned or disposed of,
 about to mortgage, assign, or dispose of his prop-
 ights or credits, or some part thereof, with intent to
 ud his creditors or give an unfair preference to some
 em; or that he has converted, or is about to convert
 property into money or evidences of debt with intent
 ace it beyond the reach of his creditors.

S. 96, 104, 106, 110, 533, 534, 2569, 2570; C. P. 237, 240, 276.

affidavit.

Must be positive as to debt and amount.

Friedlander vs. Myers, 2 A. 920; Elam vs. Helrs of Barr, 11 A. 622; Red-
 ing, Pasteur & Co. vs. Ridge, 14 A. 86.

But creditor may swear to his belief otherwise.

Clements vs. Cassidy, 2 A. 567.

Must refer to present or future, not past intentions.

City vs. Garland, 11 A. 438.

May be made with reference to the petition.

Souberain vs. Renaud, 6 A. 201; Irving vs. Edrington, 41 A. 671.

Must be for specific sum.

Friedlander vs. Meyers, 2 A. 920.

May state that defendant is about to leave permanently
 without adding "forever."

Sawyer vs. Arnold, 1 A. 315.

Aliter, before amendatory act of March, 1839.

Souberain vs. Renaud, 6 A. 201.

by whom made.

May be made by agent, but only when principal absent.

Beatty vs. Tete, 9 A. 129; Lizardi vs. Arthur, 16 L. 577; Clark vs. Morse,
 16 L. 576.

Except where principal is physically incapable.

Schneider vs. Verckner, 11 A. 274; Hawley vs. Tarbe, 14 L. 92.

Attorney at law may make affidavit without other procur-
 ation.

Hardie & Co. vs. Colvin, 43 A. 853; Fulton vs. Brown, 10 A. 350; Dwight
 vs. Weir, 6 A. 706.

(C) Evidentiary value of affidavit.

Affidavit makes *prima facie* proof.

Walker vs. Barelli, 82 A. 467.

(D) Before whom taken. C. P. 217.

May be taken before any one competent to administer oaths, such as Louisiana commissioner.

Irving vs. Edrington, 41 A. 671.

(E) Demand for attachment in petition essential.

Kelly & Frazer vs. Bently, 9 A. 596.

(F) Petition may follow writ.

1. Petition need not precede attachment; it may follow next day. So of all conservatory writs except injunction.

See Act 14 of 1890; Hann vs. Ruse, 85 A. 727.

2. But must be filed next day.

Lacey vs. Kenley, 8 L. 17.

(G) Informalities in the jurat.

Will not invalidate attachment where law substantially complied with.

English vs. Wall, 12 R. 182.

(H) Affidavit of agent need not show absence of principal.

Farley vs. Farlor, 6 A. 725; Schneider vs. Verckner, 11 A. 274.

244. Debt Not Due—Oath—That in cases where the debt or obligation is not yet due, such attachment may be granted, on the oath of the creditor, or of his agent or attorney in fact, if such creditor be absent; and it shall be lawful for any judge of competent jurisdiction to order a writ of attachment to issue, whenever the said judge shall be satisfied by the oath of the creditor or his agent or attorney, of the existence of said debt, and upon the said creditor, his agent or attorney in fact, taking oath to the requisites contained in any one of the numbers one, two, three, four or five, of article two hundred and forty, or swears that said debtor is about to remove his property out of the State before said debt becomes due; and it shall be sufficient for the oath required to be taken by the agent or attorney in fact to be to the best of his knowledge and belief.

C. P. 216, 158, 214, 276, 221, 217; R. S. 104, 106, 533, 536, 2569.

act of 1826 affidavit may be taken by agent in absence principal and when debt is not due.

Ryson vs. Lansing, 10 L. 447.

Where debt is not due, affidavit need not show intention remove property out of the State before maturity of debt. *Bank vs. McKellar*, 44 A. 940, but *after* prior to 1870; *Brent vs. Shouse*, 15 A. 110; *Millaudon vs. Foucher*, 8 L. 585; *Irish vs. Wright*, 8 R. 428.

Attachment does not lie at suit of vendor where from character of property sold parties must have contemplated removal, e. g., a steamboat.

Russel vs. Willis, 18 L. 867; *Hogan vs. Carras*, 9 A. 88; but *after* where removal was contemplated, 16 A. 46.

Surrender in another State will not mature debts in this State.

Hogan vs. Carras, 9 A. 49.

Surrender, not mere insolvency, will mature a debt in this State.

Kleinwort & Cohen vs. Klingender, 14 A. 96.

Attachment Bond—A creditor, his agent or attorney in fact, praying such attachment, must, besides, on his petition his obligation in favor of the defendant equal to that which he claims, with the surety a good and solvent person residing within the jurisdiction of the court to which the petition is presented, as security for the payment of such damages as such defendant may recover against him in case it should be determined that the attachment was wrongfully obtained.

Id., 276, 287.

of attachment.

Amount.

Under Act 17 of 1880 amount must equal plaintiff's claim; under former jurisprudence, one-half more than the amount claimed by the plaintiff.

Male & Bowling vs. Cole, 81 A. 688; *Graham vs. Burekhalter*, 2 A. 415; *Bank vs. Byrne*, 8 A. 687.

and need equal only amount sworn to.

Jackson vs. Warwick, 17 L. 466; *Johnson vs. Dickens*, 5 A. 181.

and less than plaintiff's claim is insufficient, even if it exceeds value of property attached.

Jackson vs. Warwick, 17 L. 466.

4. Where amount of bond is insufficient by one dollar, rule *de minimis* applies.

Bondet vs. Nibourel, 25 A. 499.

5. Attachment maintained to extent of the bond and affidavit, where the bond is sufficient for amount named in affidavit, but not for amount named in supplemental petition.

Johnson & Co. vs. Dickens, 5 A. 181; Pope vs. Hunter, 18 L. 808.

6. Accrued interest included in calculating amount.

Graham vs. Burckhalter, 2 A. 415.

7. Amount based on whole debt, whether matured or not.

Allen, Nugent & Co. vs. Champlin, 52 A. 518.

8. Bond blank as to amount invalid.

Lehman, Stern & Co. vs. Mrs. M. A. Broussard, 45 A.

(B) Bond in favor of clerk. Act 103 of 1870.

1. And when in favor of A (who has ceased to be clerk)

“and his successor in office,” will be sufficient.

Soowler vs. Alstrom, 88 A. 907; Schlieder vs. Martinez, 88 A. 847.

2. Means clerk of court from which writ issues.

Act 17 of 1890.

(C) Real plaintiff must give bond.

Where wife is real plaintiff bond by husband is insufficient.

Goodin vs. Allen, 12 A. 448.

(D) Bond and affidavit by agent.

1. Attorney at law employed to sue may sign bond and make affidavit without special authority.

Stewart vs. Clark, 11 A. 819; Denegre vs. Milne, 10 A. 524; Hardie vs. Colvin 48 A. 851.

2. *Aliter*, where such attorney is not licensed to practise in this State.

Wetmore vs. Daffin, 5 A. 496.

3. Authority of agent must exist at time bond and affidavit are made. Subsequent ratification not retroactive.

Bank vs. Moss, 41 A. 229; Grove vs. Harvey, 12 R. 221.

(E) Identification with suit necessary.

Bonner & Smith vs. Brown, 10 A. 384; Erwin vs. Bank, 12 R. 227.

(F) Surety on bond. Who may be surety:

1. Member of bar may be surety.

Daley vs. Duffy, 26 A. 468.

2. Tutor as such can not.

Shiff vs. Shiff, 20 A. 269.

3. Respited debtor.

Galliard vs. Creditors, 20 A. 144.

Individual member of commercial firm, even if he signs firm name.

Denton vs. Bank, 18 L. 488, 861.

idence of surety. See Act 67 of 1876.

Surety must reside within the jurisdiction of the court issuing attachment.

Austin vs. Latham, 19 L. 88; Wallace vs. Glover, 8 R. 412.

So also as to surety on sequestration bond.

Gossett vs. Cashell, 14 L. 245; Bres vs. Booth, 1 A. 867.

Surety must be good for amount of attachment bond, not property attached.

Jackson, Riddle & Co. vs. Warwick, 17 L. 486.

Surety need not necessarily be real estate owner. It is enough if he own seizable property, and prior to Act 67 of 1876 that property need not have been in this State.

State ex rel. Liquidators, etc., 27 A. 662; State vs. Judge, 27 A. 695;

Frost vs. White, 14 A. 140; Austin vs. Latham, 19 L. 88.

ency of surety.

Perhaps contingent liabilities are considered.

Durham & Co. vs. Liso & Scheen, 82 A. 416; but see Law vs. Strother, 4 R. 96.

Respited debtor may be surety.

Gaillard vs. His Creditors, 20 A. 144.

ty on alias attachment.

ety on first attachment is not bound on alias attachment.

Erwin vs. Bank, 12 R. 227.

surety.

reme Court can not permit substitution of solvent for insolvent surety.

Durham vs. Liso & Scheen, 82 A. 416.

ditions and terms of bond.

Bond must mention name of person or description of property against which attachment issues.

Hann vs. Buse, 85 A. 725.

Bond need not mention number of the suit.

Hann vs. Buse, 85 A. 725.

mption from giving bond.

United States government.

U. S. vs. Murdock, 18 A. 807.

State.

Ina. Co. vs. Board of Assessors, 40. A. 871.

246. Garnishment under Attachment—If a creditor know or suspect that a third person has in his possession property belonging to his debtor, or that he is indebted to such debtor, he may make such a person a party to the suit, by having him cited to declare on oath what property belonging to the defendant he has in his possession, or in what sum he is indebted to such defendant, even when the term of payment has not yet arrived.

The person thus made a party to the suit is termed a garnishee.

Garnishment under Fieri Facias—And whenever a party, plaintiff in a cause, has applied for a writ of *feri facias* against the defendant, and has reason to believe that a third person has property or effects in his possession, or under his control, belonging to the defendant, or is indebted to him, he may cause such third person to be cited to answer, under oath, such interrogatories as may be propounded to him touching said property and effects, or such indebtedness, in the same manner and with the same regulations as are provided in relation to garnishees in cases of attachment. Such third person shall thereupon be bound to answer in the same manner, and shall be liable in the same manner for his neglect or refusal to answer, and his answers may be disproved in the same manner as those of garnishees. In case such third person shall confess in his answers that he has property or effects in his possession, or under his control, belonging to the defendant, or is indebted to him in any sum of money, the court shall order him forthwith to deliver up said property, to pay such sum (if the same be due, and if not, when the same shall be due) to the sheriff, and a copy of said order, with the receipt of the sheriff endorsed, thereon, shall be delivered to the said third person, and shall be decreed equivalent to a receipt from the debtor himself. The property and effects in the possession of a third per-

belonging to the defendant, or debts due by him to defendant, shall be decreed to be levied as by the writ, from the date of the service of the interrogatories upon such persons.

Personal Service of Interrogatories on Garnishee Required.—And no seizure shall bind any property, money, effects, rights or claims, in the hands of a garnishee, while under process of attachment or *fiery facias*, unless the service of the interrogatories has been personal upon the garnishee.

S. 536, 1528; C. P. 642.

Garnishment, Foundation of:

Based on writ of attachment or *fiery facias*, and where there is no writ or one that has expired, garnishment ineffectual.

Matta vs. Thomas, 21 A. 37; Copley vs. Fretwell, 2 A. 310.

When writ is returned or expires, it no longer supports seizure not made before that time.

Raboteau vs. Valetton, 11 R. 220; Byrne vs. Taylor, 2 R. 341.

And under alias writ, new seizure must be made.

Cochrane vs. Bank, 11 R. 64; Black vs. Catlett, 1 R. 540.

Who may be garnished:

Only a third person, not a defendant in the suit, or in execution.

Bailey vs. Lacey, Terry & Co., 27 A. 39.

And garnishment process can not be substituted for revocatory action.

Hodges vs. Graham, Hodges & Co., 25 A. 369; Kearney vs. Nixon, 19 A. 16; but now see Act 46 of 1886.

Any resident of State, even out of jurisdiction of court, when garnishment accompanies writ of attachment, but when it accompanies *fiery facias*, garnishment must issue from court of garnishee's domicile.

Gomilla & Co. vs. Millikin, 41 A. 119; Marqueze vs. LeBlanc, 29 A. 194; Alter vs. Pickett, 24 A. 513.

Attorney at law who holds funds or property of debtor.

Daigle vs. Bird, 22 A. 139; White vs. Bird, 20 A. 183; Bank vs. Boatner, 39 A. 846.

But attorney will not be compelled to answer when his reply will divulge confidential communications of client.

Shaughnessy vs. Fogg, 15 A. 326.

4. Auctioneer who has possession.

Grieff & Byrnes vs. Betterton, 18 A. 342.

5. Warehouseman; but property in his keeping may be directly attached and taken possession of by sheriff or left with warehouseman as keeper.

Trounstein vs. Rosenham, 22 A. 525.

6. City of New Orleans.

Marchand vs. Bell, 21 A. 33.

7. Wife, with citation to husband to authorize her to answer.

Delacroix vs. Hart, 23 A. 192; Henry vs. Bryce, 11 A. 691.

8. Executor, for resulting interest of heir.

Dickson vs. Boise, 31 A. 741.

(C) Who may not be garnished.**1. Executor for any specific property, but interest of heir, even in unliquidated succession, may be seized in garnishment or under *f. fa.***

Deblieux vs. Hotard, 31 A. 194; Dickson vs. Boise, 31 A. 741.

2. United States marshal as such by process from State court.

Moore vs. Withenberg, 18 A. 22, citing 6 A. 564; 7 A. 664; 9 A. 311, 524.

3. Principal, through agent.

Lewis vs. Franks, 18 A. 564; Dickson vs. Morgan, 7 A. 490; 6 A. 563; Buford vs. Valentine, 3 N. S. 58.

4. Wife, for any debt due to husband or community, prior to its dissolution and liquidation.

Kelly vs. Robertson, 10 A. 309.

5. State.

Wild vs. Ferguson, 23 A. 752.

(D) Service on garnishee.**1. What papers served.**

C. P. 252.

2. Mode of service.**(a) Need be personal as to interrogatories only; other papers may be served at domicile.**

Act March, 1853; Schindler vs. Smith, Bullins & Co., 13 A. 473.

(b) Notice of seizure in hands of garnishee, under a *f. fa.* is sufficient where thing seized is incorporeal.

Levy. Loeb, Scheuer & Co. vs. Acklen, 37 A. 545.

3. Service must be on garnishee himself—not upon agent.

Lewis vs. Franks, 18 A. 564, citing 6 A. 563; 7 A. 490; 3 N. S. 57.

Acceptance of service by garnishee.

n vs. Simpson, 9 A. 811; Rightor vs. Phelps, 16 A. 105; Phelps vs. Lighton, 27 A. 592; Marqueze vs. LeBlanc, 29 A. 194; 18 A. 476, 480; 21 A. 580.

Ver of garnishee.

Requirements in answer. It must be full and specific. One answer may explain another and a substantial compliance is sufficient.

Maduel vs. Monsseaux, 28 A. 691; Gaty, McCune & Co. vs. Ins. Co., 12 A. 272.

Failure to answer.

(a) Judgment then rendered *pro confessis*; but it is discretionary with court to allow garnishee on mere motion to set aside judgment and answer.

Rose & McCarthy vs. Whaley, 14 A. 874; Elder vs. Rogers, 11 A. 606.

(b) And no default or rule to show cause is needed to take judgment *pro confessis*.

Sturges vs. Kendall, 2 A. 566; Landry vs. Dickson, 7 A. 241.

(c) Nor other evidence than failure to answer when properly cited.

McKinbrough vs. Castle, 19 A. 129.

Refusal to answer. Garnishee may except to answer, and on overruling of exception, may answer.

Maduel vs. Monsseaux, 28 A. 691; Bank vs. Boatner, 29 A. 848; Shaughnessy vs. Fogg, 15 A. 830.

Answering on plaintiff unless traversed.

Flash & Co. vs. Norris, 27 A. 94; Cator vs. Merrill & Co., 16 A. 197; Coleman, Britton & Co. vs. Fennimore, 16 A. 253.

Amendment of answer.

(a) Allowed. At any time before judgment against defendant, where amendment is merely to amplify.

Hennen vs. Forget, 27 A. 881; Tapp, Kennedy & Co. vs. Green, 22 A. 42; Rose vs. Whaley, 14 A. 874.

(b) Not allowed. When former answer admits indebtedness, or is evasive, etc.

Davis vs. Oakford, 11 A. 879; DeBlanc vs. Webb, 5 L. 86; Thomas vs. Fuller, 26 A. 625.

Traverse of answer.

(a) Necessity of traverse. When answers deny indebtedness or possession of property, etc.

David vs. Rode, 35 A. 961; Flash & Co. vs. Norris, 27 A. 98.

- (b) And on rule to take confessed, on answers already filed, no evidence to operate a traverse received.

Coe, Shenehan & Dewitt vs. Rocha, 22 A. 590.

7. Mode of traverse.

- (a) Rule or other proceeding on garnishee is necessary.
David vs. Rode, 35 A. 931; Estil vs. Goodloe, 6 A. 122.

- (b) No answer to rule required.

Oakey vs. R. R. Co., 13 L. 569.

- (c) Rule must be tried by jury when lawfully called for.

Foulhouse vs. Gaines, 26 A. 84; Denouyon vs. McNight, 26 A. 74.
Burke, Watt & Co. vs. Taylor, 15 L. 239.

8. Time of traverse.

- (a) By Act 27 of 1877, attaching creditor had twenty judicial days from filing of answers.

Id.; Auge vs. Variol, 31 A. 935.

- (b) By Act 73 of 1884, p. 95, seizing creditor has twenty "clear" days from time he receives notice from clerk of the filing of garnishee's answers, and his failure to traverse *ipso facto* releases seizure.

9. Sufficient evidence for successful traverse.

Positive written proof, or oath of two witnesses worthy of belief.

Bier & Gautier vs. Godehaux, 35 A. 206.

(G) *Judgment against garnishee.*

1. Time when rendered.

- (a) No judgment before judgment against defendant.
Collins & Leake vs. Friend, 21 A. 7.

- (b) Nor before determination of the order in which previous attachments are to be paid.

Oakey vs. R. R. Co., 13 L. 568.

- (c) But immediately on rendition, and before signing of judgment, proceedings against garnishee allowed.

Burke, Watt & Co. vs. Taylor, 15 L. 237.

- (d) Defendant and garnishee may be condemned in same judgment.

Kirkman vs. Hill's, 16 L. 524.

2. Amount of judgment.

- (a) Sum proved to be due by garnishee to debtor, when his answers were successfully traversed.

Clark Bros. & Co. vs. Powell, 17 A. 177; Marks & Co. vs. Reinberg, 16 A. 848; Peet, Sims & Co. vs. Whitmore, 16 A. 43.

(b) But where garnishee altogether failed or refused to answer, he is liable for plaintiff's entire claim.

Id.; O. P. 262.

(c) No judgment against garnishee holding property or money only contingently belonging to debtor or uncertain in amount.

Deblieux vs. Hotard, 82 A. 290; *Larche vs. Kent*, 10 A. 146; *Coleman, Britton & Withers vs. Fennimore*, 16 A. 253; *Maduel vs. Monseaux*, 29 A. 281.

(d) But garnishee owing a certain sum, and another sum not liquidated, may be compelled to pay the sum admitted as due.

McDowell vs. Crook, 10 A. 81.

Garnishment process not used as revocatory action.

Wells vs. Graham, Hodges & Co., 25 A. 365; *Kearney vs. Nixon*, 19 A. 16; *Attles vs. Simmons*, 21 A. 416; *Ivens vs. Ivens*, 30 A. 249; 1 R. 435; 2 A. 99; 1 A. 651.

Ever since Act 46 of 1887.

Revocatory action and attachment may proceed *pari passu* and creditor's remedy is twofold.

Ranlett vs. Constance, 15 A. 423.

Process of court to obtain garnishment not necessary.

Wells vs. Bradbury, 18 L. 332.

Process perhaps where no petition and citation.

Elder vs. Rogers, 11 A. 606.

Effect of seizure.

Property of debtor coming in hands of garnishee after notice of seizure is affected thereby.

Buddig vs. Simpson, 33 A. 375.

Garnishee owes no interest running after seizure.

Wells Bros. & Co. vs. Powell, 17 A. 177.

Effect of property garnished.

Property may order sale, subject to rights of garnishee, and on condition that sufficient be realized to pay him.

Bier vs. Gauthreaux, 35 A. 206; *Auge vs. Variol*, 31 A. 865.

Garnishee's answers are part of pleading, and need not be

Wells vs. Deffarge, 30 A. 548.

Garnishee's answer not divided.

Wells vs. Variol, 31 A. 865.

(O) Garnishment on firm.

1. Any member may answer, and if answers of individual members are desired such members should be individually cited.

Bell vs. Short, 25 A. 812; Duperiris vs. Halliday, 27 A. 182; Ferguson & O'Dowd vs. Murphy, 10 A. 58.

2. Where answer of one member conflicts with presumption arising from silence of the other, weight of evidence decides.

McCloskey, Bigley & Co. vs. Wingfield & Bridges, 52 A. 48.

(P) Defences by garnishee.

- He can plead only defences purely personal to himself.

Campbell vs. Myers, 16 A. 562; Kimball vs. Plant, 14 L. 511; Hardy vs. Palmer, 18 L. 406.

(Q) He may plead.

1. Prescription of debtors' claim against him.

James vs. Fellows & Co., 20 A. 116.

2. That he is defendant and can not be garnished.

Richardson vs. Terry et al., 27 A. 62.

3. That he owes defendant only in his fiduciary capacity, as a administrator.

Halpin vs. Barringer, 26 A. 171.

4. *Lis pendens*.

Peet, Yale & Bowling vs. McDaniel & Co., 27 A. 455.

5. Nullity of judgment and *feri facias*.

Pollock vs. Williams, 9 A. 460; Featherston vs. Compton, 8 A. 580; 8 A. 285.

6. That defendant's claim against himself is undetermined, such as unadjusted loss on a policy.

Katz & Barnett vs. Sorsby, 84 A. 588.

7. That same debt was garnished by process from other court.

Woodruff vs. French, 6 A. 62; 4 R. 529; 5 L. 428; 7 N. S. 82.

8. That he owes a negotiable note, which may not now be in hands of defendant.

Denham vs. Pogue, 20 A. 186.

(R) Paying over to sheriff.

1. Garnishee may, but can not be compelled to, pay over to sheriff amount due defendant.

Oakey vs. R. E. Co., 13 L. 568; Yale & Co. vs. Whitmore, 15 A. 63.

2. Payment to sheriff after return of writ, without order of court or consent of attaching creditor, will not discharge garnishee.

Peet, Simms & Co. vs. Whitmore, 16 A. 48.

Supplemental interrogatories to garnishee.

Additional questions to garnishee may issue without traverse of former answers.

Ober, Nanson & Co. vs. Mathews, 24 A. 92.

Garnishee may appeal.

Lin vs. Barringer, 26 A. 170.

Not until final judgment in the main action.

State ex rel. Scooler vs. Cooley, 28 A. 218.

Garnishee as necessary party to appeal.

Not necessary party except in proceedings affecting his liability.

Barnes vs. Gordon, 16 A. 824; 16 A. 128; 27 A. 201; 23 A. 260.

Liter where proceedings are taken against them.

Copley vs. Snow, 8 A. 623; Reese vs. Conyers, 16 A. 89.

Answers in open court.

Garnishees may be required to answer in open court.

Petway vs. Goodin, 12 R. 448.

But they are entitled to ample notice.

Cookfield vs. Tourres, 24 A. 188.

Interrogatories to Garnishee—A creditor may like-
 annex to his petition interrogatories on facts and
 to be answered categorically under oath by such
 ee, as to the nature of the property belonging to the
 ant which may be in his possession, and as to the
 of the sums for which he may be indebted to him.

Arrest of Garnishee—And in case a garnishee acknowl-
 himself indebted to the defendant, it shall be lawful
 judge to order said garnishee to be held to bail in
 e case as if he was the original defendant, unless
 ers depositing the money in court.

Arrest of Garnishee—If a creditor, who has filed
 atories on facts and articles to be answered by a
 ee, declare upon oath that he verily believes that
 rnishhee has in hands property or effects belonging
 btor, or is indebted to the defendant in any sum
 y, whether the same be due or not, and that such

garnishee is about to depart from the State without having filed his answers to such interrogatories, such garnishee may be arrested and confined until he gives good and sufficient security, in a sum exceeding by one-half the amount claimed by the plaintiff, that he shall appear whenever cited so to do before any judge or justice of the peace, to answer the interrogatories put to him, and that he shall answer them in the manner provided in the preceding article.

C. P. 221.

Garnishee about to depart may be arrested.

Kirkman vs. Hill, 8 L. 711.

249. His Discharge—The garnishee may nevertheless be discharged, without being obliged to give security, if he prove to the satisfaction of the court which had given the order of arrest, after notice in writing having been served on the defendant, of his intention of making such proof that he has no intention of leaving the State; or if he immediately, in the presence of the court, answer in writing and pertinently the interrogatories put to him, and file such answer in the office of the clerk of the court.

250. Garnishee—How Brought In—A garnishee may be made a party to a suit, and be cited to answer interrogatories on facts and articles, either by praying to that effect in the original petition, or by a supplemental petition filed at any stage of the suit previous to rendering the judgment.

251. Citation of Garnishee—Copy of Petition and Order—When an order to attach property in the hands of a third person has been given by a court, the clerk of such court shall deliver or send to the sheriff a copy of such order, as well as of the petition, together with a citation to the person made party to the suit, to answer such petition within the usual delay granted in ordinary cases.

Copy of Petition and Interrogatories for Garnishee.
If there be a garnishee made party to the suit, the sheriff must deliver or send to the sheriff a copy of the petition and of the interrogatories annexed to it, if there be a summons is directed to such garnishee to appear at the same within the delay given in ordinary suits.

Persons must be served: Petition and citation.

When garnishee is married woman, citation to the husband and band also.

Henry vs. Brice, 11 A. 691; *Delacroix vs. Hart*, 24 A. 141; *Marqueze vs. LeBlanc*, 29 A. 194.

Where supplemental petition is presented praying garnishment, unless it recite all the essential allegations of original petition, both must be served on garnishee.

Howell vs. Cartwright, 17 L. 547.

Service of Citation on Defendant—The sheriff must serve such citations:

On the person of the defendant, or at his domicile, if he is in the place, or if he be about to leave the State. At the place where the defendant has resided last, at his domicile in the place, and conceal himself to avoid being cited.

Service by deputy sheriff who is a minor is valid.

Living vs. Edrington, 41 A. 672.

Where absconding debtor still has domicile here, citation must be left there.

Williams vs. Kimball, 8 N. S. 355; *Thomas vs. Wetzler*, 4 A. 194.

Ministerial service strictly construed.

Parks vs. Weathersby, 16 L. 595.

Posting Citation in Case of Absent or Absconding Defendant.

If, on the contrary, the defendant has no known residence, conceal his person, be absent or reside out of the State, in such case the sheriff shall serve the petition and citation by affixing copies of the same on the door of the room where the court in which the suit is being held.

1. Posting of the writ and citation is foundation of suit, and omission is fatal: This is true only in cases of attachment.

Morris vs. Bienvenu, 30 A. 331; *Wooldridge vs. Montause*, 27 A. 32; *Patterson vs. Coy*, 3 R. 352; *Cox vs. Bradley*, 15 A. 529; *Putnam vs. R. R. Co.*, 3 R. 232.

2. And sheriff's return must show such posting, which can not be proved *aliunde*.

Id.; *DeBlanc vs. Perroux*, 21 A. 26; *Harris vs. Alexander*, 1 R. 39.

3. Posting of writ essential.

Connell vs. Medlock, 24 A. 512; *Mithoff vs. Dewees*, 9 A. 550.

Posting on leading door sufficient.

Connell vs. Medlock, 25 A. 590; *Irving vs. Edrington*, 41 A. 672.

4. Informalities can not be waived by curator's answer.

Kroentler vs. Bank, 12 R. 461; *Carpenter vs. Beatty*, 12 R. 541.

5. Who is absentee.

Citizen of another State, though he have a dwelling here where he resides a few months is an absentee.

Morris vs. Bienvenu, 30 A. 373.

6. Unrepresented absentee.

Absentee is unrepresented unless he have here agent with special power to sue and be sued.

Seymour vs. Cooley, 9 L. 77.

7. In doubtful cases.

Original domicile considered true one.

Cole vs. Lucas, 2 A. 943.

8. Citation to non-resident.

Number of days to answer may be omitted.

West vs. Wilson, 4 L. 220.

9. To whom citation is addressed.

(a) Ordinarily to the defendant, not the curator.

Jacobs vs. Frere, 28 A. 625.

(b) But when addressed to curator, his capacity must be stated.

Galloche vs. Grivot, 21 A. 431.

255. Sheriff Keeps Petition—When—In the latter case the sheriff must keep the copy of the petition, in order to deliver the same to such party, should he appear, or to the advocate appointed to defend him, in his absence.

Writ and citation are posted, not served on the advocate.
Walker vs. Barelli, 82 A. 467; Cox vs. Bradley, 15 A. 530; Kroentler vs. Bank, 12 R. 460.

In nearly all other instances when absentees are represented by curators, citations served on them.

Morris vs. Bienvenu, 80 A. 881; Samory vs. Montgomery, 19 A. 841.

At what time curator must be appointed.

Suit must be first instituted and pending.

Seymour vs. Cooley, 9 L. 77.

Seizure by Sheriff—Return—The sheriff, as soon as he shall have served the copy of the petition, in the manner prescribed in the preceding articles, and notified the garnishee of the same in the form required to be observed, if the garnishee relates to garnishees, if there be such made in the suit, must seize and detain so much of what property the debtor may possess within the parish in which his powers extend, whether it consists of real effects, rights, credits, or right of actions, as may be of value to the amount claimed in the suit; and immediately after, deliver or send to the clerk of the court by which the attachment was granted, his return in writing, stating the manner in which he has executed the writ.

Per fieri facias, mere notice to the debtor of incorporeal property is a sufficient seizure.

McDonald vs. Insurance Co., 82 A. 594; Stafford vs. Maxwell, 28 A. 847; Levy, Loeb, Scheuer & Co. vs. Aeklen, 87 A. 545.

Possession by Sheriff. Inventory—The sheriff must take charge and keep possession of all goods and effects which he may have attached, with the exception of sums which may be due by the garnishee, and he must make, in the presence of two witnesses, an exact minute inventory of the same, which he shall be required to deliver or send, annexed to his return, to the clerk of the court whose mandate he has executed.

(A) Seizure by the sheriff.

1. Except in cases of garnishment, sheriff must take actual physical possession.

Woodworth vs. Lemmermann, 9 A. 524; Scott vs. Davis, 26 A. 688; Page vs. Genereux, 6 A. 551, 581; Erwin vs. Bank, 8 A. 198; Rightor vs. Phelps, 16 A. 105; Deville vs. Hayes, 28 A. 550; Gordon vs. Gilfoil, 1 A. 265.

2. No actual seizure by sheriff necessary in garnishment.
Wight vs. Mason, 12 A. 846.

3. Nor where impossible, as in cases of incorporeal rights, where mere notice of seizure is sufficient.
Harris vs. Bank, 5 A. 538.

(B) Notes and judgment. Mode of seizure.

1. Actual possession by sheriff necessary.
Anderson vs. Valentine, 15 A. 879.

2. Particularly negotiable notes.
Denham vs. Poque, 20 A. 195; Pleasant vs. Kemp, 28 A. 124.

3. Except when notes are in *custodia legis*.
Estate of Mille vs. Hebert, 19 A. 53; see contra Scott vs. Neblett, 6 A. 182.

(C) Power to appoint keeper.

1. Sheriff may appoint keeper, whose possession is that of sheriff.

Winn vs. Elgee, 6 R. 100; Trounstein vs. Rosenham, 22 A. 525; Whann vs. Hufty, 12 A. 280.

2. Keeper is sheriff's agent, for whom he is responsible.
Watkins vs. Cawthorn, 33 A. 1195, citing 18 A. 604; 12 R. 25; 12 A. 280; 4 A. 870.

3. Sheriff need not appoint keeper when he seizes a vacant lot.
Boyles vs. Ferry, 12 A. 425.

(D) Right to custody lost—when.

Sheriff loses right to custody by sending goods or property out of his jurisdiction without order of court or consent of parties.

Dick vs. Bailey, 2 A. 974.

(E) Return.

Must show taking of physical possession, not merely seizure "according to law."

Kilbourne vs. Frellsen, 22 A. 206; Lirette vs. Currane, 27 A. 298; Miller vs. Streecker, 18 A. 56.

entory.

is necessary when property is bonded.

McKae vs. Austin, 9 A. 361.

ty of sheriff.

To seize at once, and to serve writs in order in which they are filed with him.

Lynch & Co. vs. Leckie, 9 A. 506.

To make proper and legal return.

Stockton vs. Downey, 6 A. 581.

hts of Sheriff.

demand bond of indemnity; but this does not affect his liability for illegal seizure.

Janes vs. Thompson, 12 A. 174.

Dissolution of Writ—If the defendant, thus made y to a suit appear, after having been served with citation, or prove in a summary way, after having due notice in writing to the adverse party, that the reasons on which the order for attachment had been made were false, such attachment shall be dissolved, and the party will be allowed to proceed in his defence in ordinary suits.

r. 279.

dissolution of attachment on motion.

Attachment dissolved either by rule or by exception.

Pontz vs. Reggio, 26 A. 305.

ues presented.

Allegations authorizing the attachment may be denied and put at issue.

Herman & Vignes vs. Amedee, 30 A. 393.

But truth of all the allegations of petition can not be required into, merely allegations tending to attachment.

Miller vs. Chandler, 29 A. 83; 30 A. 393; Read vs. Ware, 2 A. 493.

tion to dissolve is no appearance on merits.

an vs. White, 15 A. 624; Bouner & Smith vs. Brown, 10 A. 334.

tice to attaching creditor.

tice is absolutely necessary.

Clafin vs. Lisso & Scheen, 31 A. 172.

summary trial of motion.

. 392; Read vs. Ware, 2 A. 298.

(F) No dissolution for slight technical informalities, when, if dissolved, another writ could be obtained.

Bank vs. Hancock, 85 A. 43.

(G) Grounds for dissolving attachment.

1. For informalities in issuing writ; as, for instance—

(a) That bond was insufficient, as when in blank amount.

Graham vs. Burkhalter, 2 A. 415; Lehman, Stern & Co. vs. Broussard, 45 A.

(b) That affidavit is insufficient.

Brent vs. Shouse, 15 A. 110.

2. For failure of grounds alleged as where it is proved:

(a) That debt was only contingent.

Price vs. Merritt, 13 A. 526; Read vs. Ware, 2 A. 498.

(b) That defendant did not conceal himself to avoid citation.

Evans vs. Saul, 8 N. S. 249.

(c) That defendant was guilty of no fraud.

Herman & Vignes vs. Amedee, 30 A. 394; Brumgard vs. Anderson, 16 L. 341.

(H) No interest in dissolving attachment.

1. Party disclaiming title to property attached has no interest.

Williams vs. Williams, 26 A. 644.

2. Wife alleging that property attached belongs to husband has no interest in dissolving writ.

Mortgage Co. vs. Ralston, 53 A. 596; Watts vs. Shropshire, 12 A. 797.

(I) Estoppel to dissolve.

Consent to sale of property by sheriff estops defendants from contesting validity of process.

Wickham & Pendleton vs. Nalty, 41 A. 236.

(J) Suit on attachment bond.

1. Premature, before final dissolution of attachment, but amendment permitted.

McDaniel vs. Gardner, 34 A. 343.

2. Prescription.

(a) Action is *ex contractu* and not prescribed in one year.

Levasseur vs. Gardner, 34 A. 264.

3. *Aliter* as to claim for damages by third person.

Edwards vs. Turner, 6 R. 332.

Effect of dissolving the attachment.

1. When writ is dissolved for mere informalities in execution, but valid grounds exist for said attachment, no damages can be visited on plaintiffs: It is *damnum absque injuria*.

Baldwin & Co. vs. Mumford, 85 A. 349; Phelps vs. Broughton, 27 A. 592; 52 A. 511; 29 A. 74; 85 A. 498; 22 A. 248; 87 A. 280.

2. But when writ is dissolved as having wrongfully issued, such judgment is *res judicata* on right to damages, and sole question remains is the *quantum*.

Block vs. Meyers, 85 A. 220; Barrimore vs. McFeely, 52 A. 1179; McDaniel & Co. vs. Gardner, 84 A. 843; Cretin vs. Levy, 87 A. 182; but see Cox vs. Robinson, 2 R. 812.

Actual damages.

When writ is decided to have wrongfully issued, but no malice is shown, defendant is entitled on dissolution to claim actual damages only.

Steinhardt vs. Leman, 4 A. 885; McDaniel & Co. vs. Gardner, 84 A. 843; Dickinson vs. Maynard, 20 A. 66; Byrne vs. Gardner, 88 A. 6; Carter vs. Tufts, 15 A. 16; Leen Kee & Co. vs. Smith Brothers & Co. 85 A. 518; Cox vs. Robinson, 2 R. 812.

Elements of actual damages.

1. Byrne vs. Gardner, 88 A. 8.

Damages claimed must have been caused by the attachment suit proper. Thus:

(a) Attorney's fees for services rendered exclusively in attachment proceedings.

McRae vs. Brown, 12 A. 181; Cretin vs. Levy, 87 A. 182; Adam Bros. vs. Gomila & Co., 87 A. 480.

(b) Loss of credit when such is caused by the attachment alone and not when pre-existing.

Steinhardt vs. Leman, 41 A. 888.

(c) Or when caused by the main suit, or when crisis was inevitable.

McFarland & Dupre vs. Lehman, Abraham & Co., 88 A. 351.

(d) Property lost during attachment.

Teal vs. Lyons, 80 A. 1140; but see squarely contra Frank & Co. vs. Chaffe & Sons, 84 A. 1205.

Writ must be decided to have wrongfully issued before damages be recovered. Hence no damages recoverable:

Where attachment is maintained. So also as to other conservatory writs.

Gusman vs. DeForest, 83 A. 884; Carroll vs. Readheimer, 85 A. 874.

2. Where attachment dissolved merely for technical informality.

Baldwin & Co. vs. Mumford, 35 A. 349; Phelps vs. Broughton, 27 A. 532; Garretson vs. Zacharie, 10 M. 249.

8. When defendants make surrender and syndic estops himself from claiming damages.

Chaffe & Sons vs. Lisso & Scheen, 23 A. 203.

(O) Time within which to dissolve.

Attachment may be dissolved on motion at any time before pleading to merits, but not afterward.

Quine vs. Mayes, 2 R. 512; Myers vs. Perry, 1 A. 372; Enders vs. Clay, 3 R. 30.

Except possibly where surety becomes insolvent after such pleas, but not for prior insolvency.

Ealer vs. McAllister, 14 A. 321.

(P) Bonding no bar to motion.

Bonding attachment does not debar dissolution on motion.

Edwards vs. Prather, 22 A. 335; Meyers vs. Perry, 1 A. 372; Avet vs. Albo, 21 A. 349; Brinegar vs. Griffin, 2 A. 156; Baker vs. Hunt, 1 M. 194.

(Q) Dissolution terminates the suit against non-resident.

Successful motion to dissolve attachment against non-resident ends the suit, but bonding does not.

Kendall vs. Brown, 7 A. 663.

(R) No amendment of petition after motion.

1. To pray for the writ.

Kelley vs. Bently, 9 A. 586.

2. To allege any substantial omission in original petition.

Bank vs. Moss, 41 A. 232; Hart vs. Bowie, 34 A. 525.

(S) Plaintiff's discontinuance by consent no bar to action by defendant for damages.

Spaulding et als. vs. Wallet, 10 A. 105.

(T) Main suit proceeds after dissolution.

Sompeyrac vs. Estrada, 8 M. 723; Williams vs. Kimball, 8 N. S. 353.

259. Bonding Attachment—Terms of Bond—The defendant, if he appear either in person or by his advocate, may, moreover, in every stage of the suit, have the property attached released by delivering to the sheriff his obligation for the sum exceeding by one-half the value of

property attached, with the surety of a good and sol-
person residing within the jurisdiction of the court
the action was brought, that he will satisfy such
ent, to the value of the property attached, as may
ordered against him in the suit pending.

Turn of Bonds into Court—When the defendant has
such obligation with security, the sheriff shall be
to return the bond so taken by him into court in the
manner as is provided for bail bonds; and the
ff shall have the same right and same time to object
insufficiency of the security on such bond as the
ty on bail bonds; and in case the security on said
should be declared insufficient, the sheriff shall be
as surety on the said bond, and the said act of
shall be assigned by the sheriff to the plaintiff in
me manner as bail bonds.

Proceedings Against Surety—And when the defendant
to satisfy the judgment rendered against him, the
ff may, on the return of the sheriff that no prop-
as been found, and on exhibiting to the court said
tion duly transferred to him, obtain judgment
t the surety on said obligations, upon motion, after
ays' previous notice to said surety, which motion
e tried summarily and without the intervention of a
unless the said surety shall allege under oath that
nature to the bond purporting to be his, is not gen-
or that judgment has been satisfied.

107, 587, 8558, 8782; C. P. 261, 224, 225, 226, 227, 235.

Leading by intervenor.

Prior to Act 51 of 1876 intervenor was not allowed by law
to bond.

Alexander vs. Silbernagel, 27 A. 557; Myer & Bro. vs. Johnson, 28 A.
244; Dawson vs. Morton & Williamson, 22 A. 585; Duperlier vs. Flan-
ders, 20 A. 29.

But it seems such was common practice.

Meyer vs. Fletcher, 35 A. 881; Emanuel vs. Mann, 14 A. 53.

3. And though such bond was not judicial, it was binding according to its terms, which the courts enforced.

Id.; Slocomb vs. Roberts, 16 L. 174; 7 A. 570; Slawson vs. Ker, 29 A. 208.

4. Under such act of 1876, No. 51, intervenor may bond when he makes *prima facie* proof that he is owner, pledgee or consignee.

(B) Evidence of title authorizing bonding.

1. Possession of bill of lading.

Park vs. Porter, 2 R. 842.

2. No evidence of title.

Deed of trust.

Hughes vs. Klingender, 14 A. 52.

(C) Lessee, not being owner, pledgee or consignee, can not bond under Act 51 of 1876.

Hardy vs. Lemons, 36 A. 107.

(D) Waiver of right to bond.

Agreement to allow funds or property to remain with sheriff until termination of suit amounts to waiver.

State ex rel. Moss vs. Young, 40 A. 208.

(E) Surety.

1. He is no party to the suit; may be surety on appeal bond.

French vs. Davidson, 32 A. 718.

2. *Aliter* as to surety on injunction bond when judgment is asked or rendered against him.

Dumas vs. Mary, 29 A. 808; *Cimeo vs. Danerwhelm*, 18 A. 659; *Mehnert vs. Dietrich*, 36 A. 890.

3. Surety on defendant's release bond may subsequently intervene and claim ownership.

Redwitz vs. Waggaman, 38 A. 26.

(F) Proceeding against surety.

1. Mode of proceeding is by rule against the surety, but not against the principal.

Ledda vs. Maumus, 17 A. 817.

2. Time within which to proceed.

Not before judgment against defendant or intervenor.

Id.; *Goodman vs. Allen*, 6 A. 872; 8 A. 881.

3. Summary trial without jury.

Beal vs. Alexander, 1 R. 277.

rights of surety.

May bring suit for indemnity for liability on bond.

C. C. 3026; Edwards vs. Prather, 22 A. 334; Baker vs. Frellsen, 32 A. 329; Fuaz vs. Trager, 39 A. 293.

May show that property did not belong to defendant.

Bauer vs. Antoine, 22 A. 145.

May plead absolute, not relative, nullity of judgment against principal.

McCloskey et als. vs. Wingfield, 32 A. 48; 29 A. 141.

terms and condition of bond.

As to defendant.

Bond conditioned that judgment against defendant will be satisfied to the extent of the value of the property bonded.

Ledda vs. Maumus, 17 A. 316; Schmidt & Ziegler vs. Brown & Strauss, 33 A. 418; Emanuel vs. Mann, 14 A. 53; United States vs. Ames, 99 U. S. 35; Leman vs. Truxillo, 32 A. 71; Lemle vs. Ronton, 33 A. 1007; Stewart vs. Lacoume, 30 A. 157; 29 A. 472; 2 A. 160; 4 A. 372; 7 A. 571; 28 A. 643; 18 A. 342; Kendall vs. Brown, 7 A. 668.

As to intervenor.

(a) Bond is merely a forthcoming bond and conditioned merely for delivery of property when lawfully required.

Meyer vs. Fletcher, 35 A. 333; Stewart vs. Lacoume, 30 A. 157; Act 51 of 1876.

(b) Recital of bond binding on surety.

Price, Converse & Co. vs. Kennedy & Co., 16 A. 78.

effect of bonding.

It substitutes bond for property attached as to parties to the suit. And after bonding further intervention not allowed.

Beal vs. Alexander, 7 R. 349; 23 A. 332; Leman vs. Truxillo, 32 A. 71; Dorr vs. Kershaw, 18 L. 57; McRae, vs. Austin, 9 A. 360; Benton vs. Roberts, 2 A. 243; Cass & Dowling vs. Rouark, 25 A. 353.

It releases property from attachment lien. But contra in cases of provisional seizure.

Harrison vs. Jenks, 23 A. 707; McRae vs. Austin, 9 A. 361; 39 A. 1108; Wallace vs. Burham, 28 A. 792.

It gives to defendant right to full custody and disposition, but to intervenor mere custody, with obligation to produce when required.

Leman vs. Truxillo, 32 A. 73; Warfield vs. Stubbs, 24 A. 570.

4. It does not quash order of attachment. Motion to dissolve lies after bonding.

Love vs. Voorhies, 18 A. 550; Pailkes vs. Roux, 14 L. 82; 1 A. 372; 2 A. 154; Aret & Cambon vs. Albo, 21 A. 349.

(J) Assignment of bond by sheriff.

Not absolutely required; any party in interest may sue without assignment.

Wright vs. Oakey & Co., 16 A. 127.

(K) Liability of intervenor on bond.

No liability until breach of condition of bond shown by judgment, and then liable only for return of property bonded.

Yale & Co. vs. Hooper & Co., 16 A. 811; Meyer vs. Fletcher, 35 A. 983.

(L) Mandamus to bond.

1. Mandamus lies to compel judge to permit bonding.

State ex rel. vs. Judge, 37 A. 261; State ex rel. Block Bros. vs. Judge, 44 A. 87.

2. And appeal lies from judgment refusing to permit bonding.

State ex rel. Taylor vs. Judge, 26 A. 65.

(M) Surety on release bond.

1. Defences. He may plead:

- (a) Absolute nullity of judgment.

McCloskey & Co. vs. Wingfield, 29 A. 141; Quine vs. Mayes, 2 R. 511.

- (b) That principal did not sign.

Clements vs. Cassidy, 4 A. 380; Benham vs. Collins, 23 A. 222; Gerson vs. Baker, 7 A. 571.

- (c) That judgment is silent as to privilege on attached property.

Nalle vs. Baird, 30 A. 1140.

2. He may not plead:

- (a) Want of inventory.

McRae vs. Taylor, 9 A. 362.

- (b) Any defence which principal could not make.

McCloskey & Co. vs. Wingfield & Bridges, 32 A. 38; Keane vs. Fisher, 10 A. 261.

(N) Liability of surety on release bond.

Fixed by return *nulla bona* against principal.

Emanuel vs. Mann, 14 A. 38.

Proceedings against surety.

Return of *nulla bona*. Return of *nulla bona* in execution against principal need not be by sheriff of parish to which he has removed.

Guay vs. Andrews, 8 A. 141.

Premature before judgment against principal.

Frazer vs. Thorpe, 11 A. 47; Irish vs. Wright, 12 R. 563.

D. Advocate to Represent Absentee—If, on the contrary, the party fail to appear either in person or by his attorney, the court shall appoint an advocate to represent and defend the suit, and a reasonable delay shall be granted to such advocate to enable him to communicate with the party he represents, in order to obtain the information necessary to defend the suit.

Court having jurisdiction of attachment appoints curator.

Wasson & Co. vs. Nelson, 30 A. 26.

and acts only in such court.

Harrod vs. Norris, 10 M. 16.

He can waive nothing, as

Capacity of commissioner taking testimony.

Edmondson vs. Miss. R. R. Co., 18 L. 285.

Appeal.

Bienvenu vs. Ins. Co., 28 A. 209.

Correspondence with absentee is duty of curator, and is preferred.

Wootton vs. Jones, 14 A. 73.

E. Sale of Perishable Property Pendente Lite—If the property attached and which has been seized, be of a perishable nature, and subject to be lost or deteriorated during the pendency of the suit, the court may, at the request of the plaintiff, order the sale of such property at public auction, after the usual advertisement, and after the same has been appraised by two experts appointed for that purpose, in order that the proceeds of such sale may remain

in deposit in the hands of the sheirff until the definitive decision of the suit.

Where the goods, etc., were sold on a twelve months' bond no execution can issue thereon.

Levin vs. DeLacey, 26 A. 271.

262. Answer of Garnishee—The garnishee who has been cited in a suit, must put in his answer within the usual delay, declaring in the same, fairly and truly, what property belonging to the defendant he has in his possession, by whatever title he may possess the same, as well as what sums he may owe to such defendant, whether the same be due or not yet due, and if interrogated on facts and articles, he must answer under oath, clearly and categorically, each question put to him touching such matter.

C. P. 241, 642.

263. Refusal or Neglect to Answer—If the garnishee, to whom interrogatories have been put, refuse or neglect to answer the same under oath in the delay of the law, such refusal or neglect shall be considered as a confession of his having in his hands property belonging to the debtor, sufficient to satisfy the demand made against such debtor, and judgment shall be rendered against him for the amount claimed by the defendant, with interest and costs.

C. P. 854.

Garnishees provoking unnecessary litigation are liable for costs.

Scowler vs. Alstrom, 38 A. 907.

264. Traverse of Answer—Although the answer of the garnishee to the question put to him, be made under oath, the plaintiff may, nevertheless, show the same to be false, either by positive written proof, or by the oath of two witnesses worthy of belief, in the same manner as when interrogatories on facts and articles have been put to a party in a suit; and if it be proved by such evidence that the

debt has in his hands property or effects belonging to the party against whose property the attachment has been granted, or that he be indebted to him in any amount, such property and effects, as well as such sum as may be due by him, shall be subject to satisfy such judgment as may be rendered against the defendant.

R. S. 550; C. P. 854, 724.

Answers must be traversed within twenty days from date of service on plaintiff.

Acts of 1884, p. 96; Acts of 1877, p. 215.

5. Judgment and Execution—In suits where attachment is demanded after answer filed, or if the defendant failed to answer, the plaintiff must proceed in the ordinary form to obtain judgment, and on execution of the same, have so much of the property attached and sold as will suffice to satisfy the judgment.

C. P. 625, 246, 724.

Privilege results from attachment.

Tufts vs. Carradine, 8 A. 430; Emerson vs. Fox, 8 L. 178; Tufts & Hobart vs. Casey, 15 A. 259; Cochrane vs. Walker, 10 A. 431.

But not such a privilege as is necessary to support a sequestration.

Beck vs. Brady, 6 A. 414.

Priority of privilege.

First attaching creditor has priority in payment.

Beck vs. Brady, Brown & Co., 7 A. 1.

Order of seizure determines priority.

Harman vs. Judge, 6 A. 768; Edson vs. Freret, 11 A. 710; Rawlins vs. Sheriff, 45 A. 67; Tatum vs. Colvin, 48 A. 856.

Privilege relates back to time of seizure.

Fleming vs. Shields, 21 A. 118; Cochrane & Co. vs. Walker, 10 A. 431; Tufts vs. Carradine, 8 A. 430.

Judgment must recognize attachment and order payment by privilege.

Harmon vs. Judge, 6 A. 768; Succession of Caldwell, 8 A. 42; Nalle vs. Baird, 80 A. 1140; but see Love vs. Voorhees, 18 A. 550; Hill & Co. vs. Bourcier, 29 A. 841.

Recognition of privilege on property attached does not restrict judgment necessarily to said property.

Bathbone & Co. vs. Ship London, 6 A. 489.

(G) Surrender of property under insolvent laws defeats attachment not ripened into judgment.

Even when attachment was levied in Federal court.

Fisher vs. Vose, 3 R. 457; Hanna vs. Creditors, 12 M. 32; Collins vs. Duffy, 7 A. 40; Plassan vs. Titus, 20 A. 345; Tufts vs. Casey, 15 A. 239; 6 A. 690; 7 R. 61; 5 R. 101; 3 A. 582; Schwartz vs. Claflin, 60 F. R. 676; Yua vs. Carriere, 117 U. S. 201.

(H) Conflict of privileges.

1. Attachment privilege primes.

(a) Privilege resulting from subsequent *fi. fa.*

Beck vs. Brady, 7 A. 2.

(b) Privilege of creditors sequestering subsequently against absconding debtors under act of 1826.

Tufts vs. Casey, 15 A. 260.

(c) Mortgage of intervenor registered subsequent to levy of attachment.

Fleming & Baldwin vs. Shields, 21 A. 118.

2. Attachment privilege is primed:

By privilege for rent due.

Harmon vs. Judge, 6 A. 768.

(I) Accessories to thing attached belong to plaintiff.

Attaching creditor may sue tenant for rent not paid to sheriff.

Stockton vs. Hyde, 5 A. 800.

(J) Conflict between attaching creditor and intervenor.

1. Intervenor prevails:

(a) Where cotton is shipped to and accepted by them before attachment levied.

Burnside & Co. vs. McKinley & More, 12 A. 505; Gray vs. Trafton, 12 M. 702; Oliver vs. Lake, 3 A. 78; Bonaffe vs. Lane, 5 A. 235; Collom vs. Guillot, 18 A. 608; Wrie vs. Stevens, 5 R. 253; Flash, Lewis & Co. vs. Schwabacher, 32 A. 360.

(b) Where consignee has made advances in good faith before levy of attachment.

Maxen & Schearer vs. Landrum, 21 A. 366; Lambeth vs. Turnbull, 5 R. 264.

(c) Where before levy of attachment debt due defendant was assigned and notice given to the defendant's debtor in any way.

Bank vs. Morton, 12 R. 409; Hill vs. Simpson, 8 A. 45.

ATTACHMENT.

- (d) Where true owner of stock claims stock attempted to be seized and exhibits a certificate *bona fide* transferred by debtor to him, though transfer be not on books.

Mineral Water Co. vs. Deblieux, 40 A. 155; Kern vs. Day, 45 A. 71;
Pitot vs. Johnson, 33 A. 1286; Ins. Co. vs. Dock Co., 31 A. 49;
Smith vs. Slaughterhouse Co., 30 A. 1378.

2. Attaching creditor prevails:

- (a) Where intervenor had not accepted consignment prior to levy of attachment.

Conery vs. Webb, Rawlins & Co., 12 A. 282; Goodhue vs. McCarthy, 3 A. 56.

- (b) Where assignee of debt has not given notice to debtor before attachment levied in debtor's hands.

Golson vs. Powell, 32 A. 523.

- (c) Where debtor had not yet delivered property.

Oliver vs. Lake, 3 A. 78; Armour vs. Cockburn, 4 N. S. 669; Jorda vs. Lewis, 1 A. 59; McCloskey vs. Central Bank, 16 A. 284.

- (d) Where intervenor does not show clear title.

Ober vs. Matthews, 24 A. 90; Hill vs. Hanney, 15 A. 654; 32 A. 217;
35 A. 271.

What constitutes delivery.

1. Passing the scales at cotton presses.

Campbell & Blékarby vs. Penn, 7 A. 371.

2. Mailing of bill of lading, or delivery of same to carrier for transmission to factor.

Flash, Lewis & Co. vs. Schwabacher, 32 A. 356; see Act 66 of 1874, p. 114;
see also Act 44 of 1882, p. 56.

Under prior jurisprudence, delivery was not complete until actual receipt of bill of lading.

See Delop & Co. vs. Randolph, 26 A. 186.

3. Mere giving of title to incorporeal rights and notice to the debtor.

Relf & Co. vs. Boro, 17 A. 259.

4. Delivery of certificate of stock, without notice to company.

Kern vs. Day, 45 A. 71; Mineral Water Co. vs. Deblieux, 40 A. 155.

Scope of judgment in attachment.

1. When purely *in rem*.

When defendant is not personally in court, in cases where he may be attached, judgment is purely *in rem* and affects only the property seized.

Herber vs. Abbott, 39 A. 1112; Pennoyer vs. Neff, 95 U. S. 714;
Succession of Durand, 24 A. 322; Watson vs. Simpson, 15 A. 709.

2. When in *personam* and in *rem*.

When defendant is personally in court, recognition of attaching creditor's lien on property will not affect right to judgment *in personam*.

Rathbone vs. Ship London, 6 A. 489; Love vs. Voorhies, 18 A. 549.

266. Cancelling Plaintiff's Bond—If the debtor whose property has been attached has filed his answer, or has given instruction to the advocate appointed by the court to defend him, the act of surety given by the plaintiff shall be canceled as soon as judgment shall have been rendered in favor of such plaintiff.

But if the residence of the debtor whose property has been attached be unknown, and the advocate appointed to defend him has been unable to communicate with him, the act of surety so given by the plaintiff shall continue in full force one whole year after the date of the judgment given in favor of the plaintiff in order to secure the recourse which the debtor may have, as provided in the following article.

C. P. 614.

267. Absent Debtor—Relief—The absent debtor, against whom judgment has been so rendered, may, within two years after such judgment, obtain the reversal of the same, if he prove that the distance at which he lived from the place where the attachment was obtained, has prevented his being apprised of the proceedings had against him, and that the plaintiff has availed himself of his absence to obtain payment of a debt either already paid in totality, or partly discharged, or which did not exist.

C. P. 614.

1. Prescription of action to annul by absentee is two years.

Lambert vs. Conrad, 18 A. 245; Keith vs. Renaud & Co., 18 A. 784; Story vs. Jones, 14 A. 78.

2. And this article applies to absent persons whose property was seized and sold as property of another.

Keith vs. Renaud & Co., 18 A. 784.

. Such third person may assail validity of proceedings against the absentee.

Dumas vs. Lefebvre, 10 R. 401; *Fox vs. Fox*, 4 A. 185; *Judson vs. Connolly*, 5 A. 400.

. Judgments against absentee, not being operative beyond property attached, form no claims against his estate, and should be stricken from tableau filed by his administrator.

Succession of Durand, 24 A. 352.

8. Judgment Against Plaintiff—In case such evidence be shown by the party whose property has been attached, judgment shall be given against the plaintiff in first suit, not only for such amount as he may have recovered above the sum which was really due to him, but for such damages as may have been sustained by the defendant; but as relates to the security, such action, if brought against him, must be instituted within the year following the judgment wrongly obtained.

P. 614.

§ 3.

Of Sequestration.

9. Sequestration—Sequestration is a mandate of the court, ordering the sheriff in certain cases, to take into his possession and to keep a thing of which another person has the possession, until after the decision of a suit, in order that it be delivered to him who shall be adjudged entitled to have the property or possession of that thing. This is properly called a judicial sequestration.

S. 96; C. O. 2979; O. P. 287, 724.

Sequestration construed strictly, and not extended by implication.

Wesley vs. McConnell, 87 A. 552; *Wilson vs. Churchman*, 4 A. 452; *Barriere vs. Feste*, 9 A. 485; but see *Blanchard vs. Luce*, 19 A. 47.

Sequestration will not issue:

. Where plaintiff brings a revocatory action; he claims neither ownership nor lien or privilege.

Talaman vs. Tasse, 4 R. 462.

2. Where one party sues another for account.

Shropshire vs. Russel, 2 A. 961; but see Blanchard vs. Luce, 19 A. 47.

3. Where plaintiff claims the writ merely on ground of insolvency of debtor.

Barriere vs. Feste, 9 A. 535.

4. Where plaintiff, a common carrier, sequesters goods entrusted to it.

Pharr vs. Collins, 35 A. 940.

(C) No leave of court necessary to file supplemental petition demanding sequestration.

Leavenworth vs. Plunkett, 7 L. 341.

(D) What court competent to issue.**1. Competency *ratione personæ*.****(a) Court of defendant's domicile, where a judgment is also sought *in personam*.**

Spear vs. Hagelberg, 16 A. 8.

(b) Court of new domicile competent, when domicile is changed.

Ripsey vs. Drumgoole, 8 M. 711.

(c) Where defendant has property subject to privilege in other parish than that of his domicile, exception to jurisdiction *in personam* sustained and suit continued *in rem* alone.

Peterson vs. Willard, 17 A. 98; Lalaurie vs. Wood, 8 A. 366; Henning vs. Steamer St. Helena, 5 R. 349; Richard vs. Kimball, 5 R. 142; Blanchard vs. Davidson, 7 A. 634; Thorn vs. Tyson, 9 A. 231.

But see the following cases where entire proceedings are dismissed for want of jurisdiction.

Bradley vs. Woodruff, 26 A. 800, 880; Hollander vs. Nicholas, 8 R. 7; Gay vs. Eaton & Barstow, 27 A. 166; Eochereau vs. Guldry, 24 A. 311

By Act 64 of 1876, p. 106, Court where property is situated may issue writ at option of plaintiff.

2. Competency *ratione materiæ*.

Court issuing must be competent *ratione materiæ*.

Overton vs. Overton, 10 L. 468.

(E) Conflict of jurisprudence settled.

Court where property is situated or where defendant resides may now issue writs of sequestration and provisional seizure.

Act 64 of 1876, p. 106.

ance by clerk.

Bank of court may issue writ in absence of judge.

Act 106 of 1880, p. 124; Acts 1882, No. 48.

Sequestration from lower court pending appeal.

Lower court may issue writ though case be on appeal.

McFarlane vs. Richardson, 1 A. 12; Williams vs. Duer, 14 L. 536; 1 M. 79.

Where the debt of creditor claiming privilege exceeds the limit of jurisdiction of court sequestering, he may compel a transfer of property to higher court.

Pay vs. Terry, 10 L. 70; Lawes vs. Chinn, 4 N. S. 390.

Effect of judgment.

Where defendant is not personally before the court, as being non-resident or having domicile in another jurisdiction, the judgment should be purely one *in rem*, affecting only the property sequestered.

Act 64 of 1876, p. 106; Peterson vs. Willard, 17 A. 95; Henning vs.

Steamer St. Helena, 5 A. 349; Lalaurie vs. Woods, 8 A. 366.

Sequestration per se gives no privilege.

Liter as to attachment.

Succession of Elliott, 31 A. 87.

But privilege on sequestered goods follows proceeds.

Pratt vs. Piet's Curator, 3 L. 275.

For does sequestration divest title of the owner.

Succession of McManus vs. Jewett, 6 L. 542, 530.

Judicial Sequestration—In this acceptance, the sequestration, does not mean judicial deposit, but sequestration may exist together with the right of attachment, while mere deposit does not admit it.

What Can Be Sequestered—All species of property, real, personal, as well as the revenue proceeding from the same, may be sequestered.

Property may not be sequestered:

Property in custodia legis in possession of—

(a) Sheriff or constable.

Twitty vs. Clarke, 14 A. 508.

(b) Receiver.

Gest & Atkinson vs. R. R. Co., 80 A. 29.

(c) Judicial sequestrator.*Bank vs Hozey*, 2 R. 150.**2. Vessels, in sequestration purely in rem, in State court.***The Moses Taylor*, 4 Wallace; *Haberle vs. Barringer*, 29 A. 410; *Brown vs. Matanzas*, 19 A. 884.

272. Obligations and Titles—Obligations and titles may also be sequestered when their ownership is in dispute.

Certificate of stock may be bonded.

State ex rel. Olty vs. Judge, 22 A. 260.

273. Judicial Sequestration—Judicial sequestration is generally ordered only at the request of one of the parties to a suit; there are cases, nevertheless, where it is decreed by the court without such request, or is the consequence of the execution of judgments.

The rules relative to the sequestration in consequence of the execution of judgment, will be found in the chapter which treats of the execution of judgments.

O. P. 637.

Ex officio sequestration by court.

No judicial sequestrator need be appointed when property is released on bond.

Young vs. Magazine Street R. R. Co., 24 A. 40.

274. Ex Officio Sequestration—When—The court may order, *ex officio*, the sequestration of real property in suits, where the ownership of such property is in dispute and when one of the contending parties does not seem to have a more apparent right to the possession than the other.

In such cases, sequestration may be ordered to continue until the question of ownership shall have been decided.

O. P. 638; R. S. 538, 2899, 3533.

275. Grounds for Sequestration—Sequestration may be ordered at the request of one of the parties in a suit, in the following cases:

1. Suit for Possession—When one, who had possessed

more than one year, has been evicted through violence, and is to be restored to his possession.

Suit for Possession of Movables—When one sues for possession of movable property, and fears that the losing possession may send the property in dispute beyond the jurisdiction of the court during the pendency of the suit.

Waste or Conversion of Revenues—When one claims ownership or the possession of real property, and has reason to apprehend that the defendant may make waste in his possession to dilapidate or to waste the fruits or revenues produced by such property, or convert them to his use.

Suit in to Dotal Property—When a woman sues for a separation from bed and board, or only for a separation of property from her husband, and has reason to apprehend that he will ruin her dotal property, or waste the revenues produced by the same, during the pendency of the action.

Case of Respite—When one has petitioned for a stay of proceedings and a meeting of his creditors, and such stay gives him fear that he may avail himself of such stay of proceedings to place the whole or a part of his property out of the reach of his creditors.

Special Mortgage Creditor—A creditor by special mortgage shall have the power of sequestering the mortgaged property, when he apprehends that it will be removed out of the State before he can have the benefit of his mortgage, and will make oath of the facts which induce his apprehension.

Cases of Lien or Privilege—The plaintiff may obtain sequestration in all cases where he has a lien or privilege on property, upon complying with the requisites prescribed by law.

Apprehended Concealment or Disposition Pending

Suit—A sequestration may be ordered in all cases, when one party fears that the other will conceal, part with, or dispose of the movable in his possession, during the pendency of the suit, upon complying with the requisites of the law.

R. S. 449, 538, 539, 2900, 3533, 3534; C. P. 724, 1124, 158, 221, 224; C. C. 3185, 3217.

(A) When writ of sequestration will issue.

Causes enumerated in C. P. 275 are not exclusive of others when prescribed by law. Thus creditors of absconding debtor may demand sequestration and thus place prior attaching creditors before judgment on footing of equality with them.

Levois vs. Gerke, 12 A. 829; Tufts & Hobart vs. Casey, 15 A. 258.

Par. 2.

(a) When plaintiff sues for possession of movables bought with his money.

Pirtle vs. Price, 31 A. 357.

(b) Or in which he has undivided interest.

Blanchard vs. Luce, 19 A. 47.

(c) Or when a depository is fraudulently disposessed of goods.

Lannes vs. Courege, 31 A. 74.

(d) No sequestration issues against a bank, depository of the city, to seize at instance of city's creditors certain funds or moneys deposited therein, to be checked on to pay said creditors.

Southern Bank vs. Louisiana National Bank, 28 A. 97.

(e) The words "during the pendency of the suit" are not sacramental.

Wills vs. St. Didier, 1 A. 119.

(f) Sequestration may accompany suit for partition of movables.

Segur vs. Sorel, 11 L. 441.

Par. 3. Allegation of apprehension of waste or conversion to use is necessary, in sequestration made under paragraph 3.

Pasley vs. McConnell, 37 A. 552; Copley vs. Bonner, 7 A. 578.

Par. 5. When, in cases of insolvency, creditors sequester insolvent's property and such sequestration by one creditor enures to benefit of all.

Ratti & Pipon vs. Creditors, 9 L. 28; Andrus vs. Creditors, 45 A.

6.

- (a) When creditor fears debtor will remove mortgaged property out of State before he can enforce his mortgage.

Duncan vs. Wise, 89 A. 74; *Walton vs. Learned*, 41 A.

- (b) Affidavit must allege fear of removal, even when he claims privilege.

Blanc & Legendre vs. Wallace, 26 A. 498; *Selleck vs. Kelly*, 11 R. 145; *Bres vs. Booth*, 1 A. 307; *Wilson vs. Churchman*, 4 A. 456.

7. In all cases where party has lien and privilege. Thus:

- (a) Vendor of agricultural products enforcing vendor's lien within five days after delivery.

Gumbel & Co. vs. Beer et al., 86 A. 469; *Miltnerberger vs. Hetch*, 18 A. 528; *Tyree vs. Sand*, 24 A. 863; *Allen, Nugent & Co. vs. Buissan*, 85 A. 109.

- (b) Nature of the privilege necessary to support sequestration. The word "privilege," as used here, means privilege granted by law as distinguished from the preference or "privilege" of attaching creditor; such privilege will not sustain sequestration.

Beck vs. Brady, 6 A. 444.

- (c) Plaintiff must allege, not only privilege, but fear of removal.

See *supra* Par. 6 (b).

8.

- (a) When party fears that the other will conceal, part with, or dispose of the movable in his possession during pendency of suit.

Daugherty vs. Executrix of Vance, 80 A. 1246; *Dumontell vs. Dubroqua*, 1 R. 581.

- (b) Affidavit in the form usually used for attachments will sustain sequestration.

Gumbel & Co. vs. Beers & Co., 86 A. 487.

Sequestration before maturity of debt.

Right to sequester and fact of sequestration do not mature unmatured obligations. In such event, the sequestration, if well taken, is maintained, but suit is stayed.

Catlett vs. Heffner & Likens, 23 A. 578; *Gardner vs. Shipley*, 4 A. 194; *Neilson vs. Pool*, 17 C. 212.

Affidavit—Bond—A plaintiff wishing to obtain an order of sequestration in any one of the cases above provided must annex to the petition in which he prays for

such an order, an affidavit setting forth the cause for which he claims such order: he must, besides, execute his obligation in favor of the defendant for such sum as the court shall determine, with the surety of one good and solvent person residing within the jurisdiction of the court to be responsible for such damages as the defendant may sustain in case such sequestration should have been wrongfully obtained.

Orders of sequestration may be granted before the filing of the petition, in the cases specified, and agreeably to the rules prescribed in article two hundred and thirty-seven of this Code.

R. S. 101, 525; C. P. 214, 216, 237, 243, 244, 245, 267, 217.

(A) *Affidavit.*

1. It must show the facts justifying the writ.

Erwin vs. Jones, 5 L. 345; Selleck vs. Kelly, 11 R. 15; Gumbel & Co. v. Beer et als., 36 A. 486.

2. It must state privilege or ownership.

Baer vs. Kopler, 19 A. 194.

3. It must state amount of debt with precision.

Wilson vs. Churchman, 4 A. 452.

This does not apply where partner suing for settlement of sequestrators.

Blanchard vs. Luce, 19 A. 47.

4. It may be in the alternative.

Kuhn & Co. vs. Embry & Pilcher, 35 A. 489; Mabry vs. Talia, 15 A. 504; Wells vs. St. Didier, 9 A. 119, overruling Banaldson vs. Hamilton, 1 A. 204.

5. If made by agent it must show agency.

Wallace, Lithgow & Co. vs. Byrne, 17 A. 8.

6. Affidavit of facts necessary, but it is immaterial whether such affidavit be to original or supplemental petition.

Ohio Insurance Co. vs. Edmondson, 5 L. 295.

7. Effect of affidavit. It makes *prima facie* proof of contents.

Carter & Co. vs. Lewis, 15 A. 574; Cypress Shingle and Lumber Co. v. Lorio, 46 A.; 13 A. 581.

8. Affidavit by agent. Valid only when principal is absent from parish.

Hawley vs. Tarbe, 14 L. 92.

d.

amount of bond. Fixed by the judge; and if not fixed when order is made, can not be fixed *nunc pro tunc*.

Leman vs. Truxillo, 52 A. 75.

Whose Favor. Bond payable to clerk of court issuing writ. Act 103 of 1870, p. 18 (Acts of 1871).

Objections to bond. Illegality of bond must be urged *in mine*.

Vestal vs. Sallis, 34 A. 153.

Necessity of bond. Bond necessary usually when sequestration is on application of one of the parties.

Pasley vs. McConnell, 36 A. 704; McClendon vs. Bennett & Addison, 16 A. 335; Logan vs. Hickman, 14 A. 298.

But court has power *ex officio*, without affidavit and bond, to order sequestration.

Allen, West & Bush vs. Whetstone, 35 A. 846.

Surety. Residence. Must reside within jurisdiction of court issuing writ.

Bres vs. Booth, 1 A. 307; Gossett vs. Cashell, 14 L. 246; Wells vs. Walker, 24 A. 181.

Amount of Bond—When security is given in order in the sequestration of real property which brings a sale, the judge must require that it be given for an amount sufficient to compensate the defendant, not only for the damage which he may sustain, but also for the profit of such revenue during the pendency of the action.

No Bond in Sequestration of Insolvent—The defendant, when he prays for a sequestration of the property of an insolvent who has failed, is not required to give such security, but that property bring in a revenue.

259.

Release of Seizure by Bonding—Defendant—

Return of Bond—A defendant against whom a writ of sequestration has been obtained, except in case of failure, may have the same set aside by executing a writ of habere corpus in favor of the sheriff, with one good and sufficient surety, for whatever amount the judge may determine being equal to the value of the property to be released from his possession.

And whenever the defendant shall fail or neglect to execute such obligation, in the manner prescribed, within ten days after the seizure of the property by the sheriff, then it shall be lawful for the plaintiff, his agent or attorney in fact, to give similar bond and security to the sheriff as that required by law from the defendant, and to take the property sequestered into his possession.

And in all cases where the property sequestered shall be released on the defendant executing a bond with security, the sheriff shall be bound to return the bond, so taken by him, into court in the same manner as is provided for bail bonds; and the plaintiff shall have the same right and the same time to object to the insufficiency of the security on such bond as to the security on bail bonds, and in case the security on said bond should be declared insufficient, the sheriff shall be liable as surety on said bond, and the said act of surety shall be assigned by the sheriff to the plaintiff in the same manner as bail bonds.

C. P. 259, 224, 225, 226, 227, 235; R. S. 540, 3535.

(A) Dissolution of sequestration.

1. Dissolution is obtained in two ways:

By motion to dissolve, and by bonding.

Yaeger Milling Co. vs. Lawler, 39 A. 573; Leman vs. Truxillo, 3 A. 69.

2. Allegations of affidavit taken as true.

Pirtle vs. Price, 81 A. 357.

3. Damages on dissolution of sequestration.

(a) Actual damages only recoverable, except in case of notice.

Broxton vs. Bloom, 15 A. 613.

(b) Elements of actual damages.

1. Attorney's fees for dissolving writ.

Bonner vs. Copley, 15 A. 504; Penny vs. Taylor, 9 A. 713.

2. Damage to property; and sequestering creditors will not, when sued for damages, be permitted to dispute defendant's title.

Brandon vs. Allen, 23 A. 60.

No right to any damages whatever:

(a) When sequestration rightfully issued, but is set aside for subsequently ascertained insolvency of surety.

Isaacson, Selxas & Co. vs. Wall, 22 A. 248; see also 27 A. 592; 10 M. 249; 89 A. 74; 82 A. 511; 85 A. 488.

(b) And a mere discontinuance is no evidence of wrongful issuance, particularly *quoad* the surety.

Stetson vs. LeBlanco, 6 L. 266.

Action on the bond necessary.

Damages can not be claimed on motion to dissolve.

Nugent vs. Gore, 24 A. 206; Morgan vs. Driggs, 17 L. 176.

No interest in moving to dissolve.

Defendant renouncing title to sequestered property can not move to dissolve.

Mortgage Co. vs. Ralston, 88 A. 598.

Additional grounds to dissolve.

Other grounds to dissolve than those stated in motion can not be urged on appeal.

Carter vs. Lewis, 15 A. 573; Blanchard vs. Luce, 19 A. 47.

Appeal from judgment dissolving sequestration.

Appeal lies, and judgment, being interlocutory, need not be signed.

Van Winkle vs. Flecheaux, 12 L. 148.

Dissolution. By bonding.

Right to bond absolute. Defendant need not pay accrued costs as prerequisite to bond.

Fink vs. Martin, 10 B. 147.

Where bonding permitted. Bonding allowed in all cases, including cases of *ex officio* sequestration, except in case of "failure."

State ex rel. Taylor vs. Judge, 26 A. 65.

(a) "Failure" means judicially declared failure.

Hyman, Lichtenstein & Co. vs. Judge, 41 A. 847.

(b) And part only of sequestered property can not be bonded without consent of other party.

Taylor vs. Penrose, 12 L. 188.

Effect of bonding.

(a) It does not shut out interventions when defendant was without interest.

Leman vs. Truxillo, 82 A. 72; White vs. Hawkins, 16 A. 28; but see contra Burbank vs. Taylor, 28 A. 751; Carroll vs. Bridwell, 27 A. 239; Pfifer vs. Maxwell, 28 A. 862.

- (b) Property still controlled by the court. Thus plaintiff bonding can not be sued for property in another court.

Tucker vs. Musselman, 6 A. 226.

Nor can party bonding dispose of property.

Pagett vs. Curtis, 15 A. 451; but see Warfield vs. Stubbs, 24 A. 369.

4. Terms of bond.

- (a) That party bonding:

1. Will not send property out of jurisdiction.
2. Will not make any improper use of it.
3. Will faithfully restore same after definitive judgment.

Downey vs. Kenner, 42 A. 1129; Harrison vs. Jenks, 23 A. 707; Leman vs. Truxillo, 32 A. 72; Baker vs. Morrison, 4 A. 372; Jacobson vs. Seville, 6 A. 277.

- (b) No other conditions than above are legal and binding, e. g., that surety will pay such judgment as is rendered, etc.

Mulligan vs. Vallee, 31 A. 375; King vs. Baker, 7 A. 570; Welsh vs. Barrow, 9 R. 537.

- (c) But such condition is tacitly implied on failure to deliver property.

Schmidt & Ziegler vs. Brown, 33 A. 418.

5. Who may bond. Bonding is allowed:

- (a) To defendant.

Duperier vs. Flanders, 20 A. 30; State ex rel. Taylor vs. Judge, 26 A. 65.

And plaintiff in main action may be defendant in sequestration.

State ex rel City vs. Judge, 22 A. 260.

- (b) To plaintiff when defendant has not bonded within ten days after seizure.

Act March, 1842; Clapp & Co. vs. Phelps & Co., 19 A. 461.

Prior to 1842 plaintiff could not bond.

Comstock vs. Pale, 15 L. 481.

- (c) To intervenor, claiming as owner, pledgee or consignee.

Act 51 of 1876.

- (d) But not when he merely holds as lessee or bailee.

Hardy vs. Lemons, 36 A. 108.

1. Prior to Act 51 of 1876, intervenor could not legally bond.

Clapp & Co. vs. Phelps & Co., 19 A. 461; Duperier vs. Flanders, 20 A. 29; Alexander vs. Silbernagel, 27 A. 537; 28 A. 24.

2. See, however, following cases:

Catalogne vs. Bauvier, 4 A. 467; see Hardy vs. Lemons, 88 A. 107.

3. Bonding where property is also attached: Reservation that property should not be considered released from attachment is proper.

Jaffray & Co. vs. Judge, 89 A. 1108.

4. What property may be bonded.

Certificate of stock.

State ex rel. City vs. Judge, 22 A. 260.

5. What property may not be bonded.

Property held in indivision between party offering to bond and another party opposing.

State ex rel. Roth vs. Judge, 88 A. 49.

6. Remedy where bonding is refused: Remedy is by appeal, not mandamus.

State ex rel. Roth vs. Judge, 88 A. 50; State ex rel. Morgan R. R. vs. Judge, 86 A. 894; State ex rel. Jaffray & Co. vs. Judge, 89 A. 1108; State ex rel. Taylor vs. Judge, 26 A. 65.

10. Proceedings on the bond.

Liability of surety.

(a) Failure to produce property bonded authorizes proceedings against principal and sureties without formality of execution against defendant.

Welsh vs. Barrow, 9 R. 535; Materne vs. Lion et al., 85 A. 988; Noble & Kaiser vs. Warner, 21 A. 284; but see Downey vs. Kenner, 42 A. 1129.

(b) Or of suing third persons who seized and sold the property.

Gordon vs. Diggs, 9 A. 422; Clapp vs. Seibrecht, 11 A. 528.

(c) But, *semble*, this ruling does not apply where the intervenor bonds.

See Welsh vs. Barrow, 9 R. 535.

(d) Nor in cases of attachment.

See Goodman vs. Allen, 8 A. 881.

(e) In all cases proceedings against surety may commence on return of *nulla bona* against principal.

Baker vs. Morrison, 4 A. 872; Masse vs. Barthet, 2 R. 69.

11. Assignment of bond. Not essential.

Wright vs. Oakey, Hawkins & Co., 16 A. 125.

12. Extent of surety's liability.

He is bound at most to value of the property and never any more than plaintiff's claim.

Carroll & Co. vs. Hamilton, 30 A. 523; Lemle vs. Ronton, 33 A. 1005; Lalaune Bros. vs. McKinney, 28 A. 642.

13. Rights of surety.

(a) He may sue for possession of property as against a mere spoliator, fraudulently obtaining possession.

Ealf vs. Imboden, 7 A. 110.

(b) He may replace bonded property with like kind.

Mulligan vs. Vallee, 31 A. 377.

He may plead:

(a) That judgment is *in personam* only against defendant and does not recognize plaintiff's lien or privilege.

Nalle vs. Baird, 30 A. 1143.

But it seems that where a debt is secured by privilege, merger into judgment making no mention of privilege will not destroy it.

Hill vs. Bourcier & Pond, 29 A. 341.

(b) Any defence not resulting from the condition or personal incapacity of principal.

Benham vs. Friend, 23 A. 22; Baker vs. Frelsen, 32 A. 329.

He may show nullities in the seizure.

King vs. Baker, 7 A. 371; but see Fuss & Backer vs. Trager & Noble, 39 A. 292; Kendall vs. Brown, 7 A. 688; McCloakey vs. Wingfield, 32 A. 38; Wright vs. Oakey, Hawkins et als., 16 A. 125.

He may not plead:

(a) That agent signing for principal had no authority.

Materne vs. Lion, 35 A. 983.

(b) That sequestration was illegal for informalities.

Hawkins & Roberts vs. Beer, 37 A. 54.

(c) That he had a superior lien.

Carroll & Co. vs. Hamilton, 30 A. 522.

14. No appeal from order bonding.

State vs. Judge, 14 L. 590; City vs. Judge, 22 A. 260; but see 5 N. S. 43; 10 M. 174.

(a) But in case of attachment appeal lies from such order.

State ex rel. Street vs. Judge, 35 A. 513.

(b) Or from order refusing right to bond in sequestration or attachment.

State ex rel. Taylor vs. Judge, 26 A. 65; Taylor vs. Penrose, 12 L. 137; State ex rel. Gay & Co. vs. Judge, 26 A. 299; Duperier vs. Flanders, 20 A. 29; Dawson vs. Williamson, 22 A. 535.

6. Contest between plaintiff and intervenor.

Plaintiff prevails:

- (a) Where plaintiff proves continued ownership and intervenor claims possession on such issue alone.

Nugent & Co. vs. Buisson, 85 A. 111; Burckett vs. Hobson, 19 A. 489.

- (b) Where plaintiff claiming vendor's lien, sequesters agricultural products within five days, even when passed into the hands of third persons.

Gumbel vs. Beer, 86 A. 484; Hawkins & Roberts vs. Becr, 87 A. 53.

- (c) Where intervenor does not identify goods or property with certainty.

Newman vs. Cannon, 44 A. 579.

7. When title based on *dation en paiement*, consent, fixed price and delivery essential.

Nugent vs. Buisson, 85 A. 111; Bourg vs. Lopez, 86 A. 439.

7. When intervenor claims as owner he can not prove that he is pledgee, *et vice versa*. He may be required to elect.

Silbernagel vs. Baker, 23 A. 699; Hawkins & Roberts vs. Beer, 87 A. 53;

Yeatman vs. Estill, 18 A. 222; Fleming & Baldwin vs. Shields, 21 A.

119; Carroll vs. Bridewell, 27 A. 289.

8. Terms of Release Bond by Defendant—The security given by the defendant, when the property sequestered consists in movables, shall be responsible that he shall not send away the same out of the jurisdiction of the court; that he shall not make an improper use of them; that he will faithfully present them, after definitive judgment, in case he should be decreed to restore the same to the plaintiff.

9. As to Landed Property—As regards landed property this security is given to prevent the defendant, while in possession, from wasting the property, and for the faithful substitution of the fruits that he may have received since judgment, or of their value in the event of his being cast out of suit.

P. 259.

10. Sheriff's Return and Inventory—When the sheriff sequesters property pursuant to an order of the court,

he shall, after serving the petition and the copy of the order of sequestration on the defendant, send his return in writing to the clerk of the court which gave the order, stating in the same, in what manner the order was executed, and annex to such return a true and minute inventory of the property sequestered, drawn by him in the presence of two witnesses.

C. P. 259, 256.

283. Sheriff's Administration of Sequestered Property and Compensation—The sheriff, while he retains possession of sequestered property, is bound to take proper care of the same, and to administer the same, if it be of such nature as to admit of it, as a prudent father of a family administers his own affairs. He may confide them to the care of guardians or overseers, for whose acts he remains responsible, and he will be entitled to receive a just compensation for his administration, to be determined by the court, to be paid to him out of the proceeds of the property sequestered, if judgment be given in favor of the plaintiff.

C. P. 657; C. C. 2980.

(A) Compensation of Sheriff for administration.

Fixed by the court at discretion.

Parkerson vs. Boyle, 7 R. 82; Graham vs. Swayne, 1 R. 186; Avart vs. King, 14 L. 63.

(B) Power of Sheriff.

He is authorized to take all necessary steps or incur necessary debts to protect property.

Id.; see above.

(C) Liability.

1. Sheriff liable for not presenting for payment a bill of exchange sequestered before maturity.

Parish vs. Hozey, 17 L. 579.

2. Sheriff responsible for keeper.

Watkins vs. Cawthorn, 33 A. 1194; Whann vs. Hufty; Smith vs. Berwick, 12 R. 25; Stille vs. Beauchamp, 13 A. 604.

(D) Keeper.

Defendant may be keeper.

Smith vs. Berwick, 12 R. 25.

§ 4

Of Provisional Seizure.

4. Provisional Seizure of Property held in Pledge or subject to a Privilege—The plaintiff may, in certain cases after provided, obtain the provisional seizure of the property which he holds in pledge, or on which he has a lease, in order to secure the payment of his claim.

L. S. 96; C. P. 643, 724, 237.

From what court.

1. Provisional seizure and sequestration may issue from court of debtor's domicile or from court where property is situated, at option of plaintiff.

Act 64 of 1876, p. 106.

2. But when issued by court where property is situated and where defendant is not domiciled, judgment affects only property sequestered or provisionally seized.

Carroll vs. Bancker, 43 A. 1194.

3. Property on which privilege rests need not be actually seized. Action need only be *quasi in rem*.

Carroll vs. Bancker, 43 A. 1194.

Issues in advance of petition—when:

In all cases where attachments, arrest, sequestration and provisional seizure are demandable, the plaintiff, his agent or attorney, having made affidavit and given bond in conformity to law, and having filed the same in court and obtained the order of the judge for the issuance of the writ, it shall be the duty of the clerk to issue forthwith the same without any petition being then presented; but the usual petition shall be filed on the day succeeding that on which the said process shall have issued, except in cases where a Sunday or a legal holiday shall be the succeeding day, then on the day next such day of public rest, and the sheriff shall proceed immediately to execute said process according to law."

Act 14 of 1880, p. 20.

Clerks of Court may issue sequestration, provisional seizure, etc.

Act 106 of 1880, p. 184.

Who may sue out writ.

Assignor or his subrogee.

Martin vs. Dickson, 35 A. 1088; Walker vs. Vanwinkle, 10 M. 289.

(E) Who may not.

1. **Lessor who has waived the right for a legal consideration.**
Cain vs. Pullen, 34 A. 511.

2. **Mere creditor, without lessor's privilege or pledge.**
Friedler vs. Ohotard, 35 A. 275.

3. **Privilege based on lease, and no lease without a fixed price.**

Fisk vs. Moores, 11 R. 279; Haughery vs. Lee, 17 A. 23; Gleason vs. Sheriff, 20 A. 268; University Publishing Co. vs. Piffet, 34 A. 602.

285. When Writ Issues—Provisional seizure may be ordered in the following cases:

1. **Executory Proceedings—**In executory proceedings, when the plaintiff sues on a title importing confession of judgment;

2. **Lease—**When a lessor prays for the seizure of furniture or property used in the house or attached to the real estate which he has leased;

3. **By Seamen and Material Men—**When a seaman, or another person, employed on board of a ship or water craft navigating within the State, or persons having furnished materials for, or made repairs to such ship or water craft, prays that the same may be seized and prevented from departing until he has been paid the amount of his claim;

4. **Proceedings in Rem—**When the proceedings are *in rem*, that is to say against the thing itself which stands pledged for the debt, when the property is abandoned, or in cases where the owner of the thing is unknown or absent;

5. **Suits for Laborers' Wages—**Laborers on farms or plantations, whether they are employed by the day, month or year, when they sue for their wages, shall have the right to provisionally seize the crop or other thing on which they have a privilege for such employment, by making oath that they verily believe the crop or other thing on which they may have a privilege, is about to be removed from the farm or plantation or place where it was raised,

inarily belongs; or if it has already been *removed*, they verily believe the thing is about to be sold or red of, so as to deprive them of their privilege.

440, 542, 2912, 2918; C. P. 723, 275, 1283, 732; C. O. 3217, 3239.

Writ issues.

By Act 30 of E. S. 1870, city of New Orleans may issue writs of provisional seizure for unpaid licenses.

New Orleans vs. Waggaman, 31 A. 299.

Property of real lessor not seizable in suit solely against nominal lessor.

Aurich vs. Wolf & Levi, 30 A. 375; but see Washburn vs. Frank, 31 A. 429; Reynolds vs. Swain, 4 L. 125.

Cases recited above authorizing writ are exclusive, not illustrative. Sequestration issues on all privileges; not so provisional seizure, which must be specially authorized.

Smith vs. Smith, 2 A. 447.

Writ issues in executory process.

Frost vs. McLeod, 19 A. 30.

Writ issues—

(a) When lessor sues for rent and prays for seizure.

Shiff vs. Ezekiel, 23 A. 333; Lalaurie vs. Woods, 3 A. 366; Wallace vs. Smith, 3 A. 374; Dillon vs. Poirier, 34 A. 1102.

(b) And mere failure to pay rent authorizes affidavit of fear of removal of property.

Id.

(c) No allegation of fraudulent intent of defendant necessary.

Dillon vs. Poirier, 34 A. 1102.

(d) Writ will be set aside if issued after offer to pay, though rent has been due and demanded in vain.

Fox vs. McKee, 31 A. 67; Carroll vs. Banoker, 43 A. 1194.

(e) Lessor need not demand payment the very day rent falls due.

Hyde vs. Palmer & Southmayd, 6 L. 599.

Writ issues at suit of laborers and overseers.

Hollander vs. Nicholas, 3 R. 7.

By act March 15, 1855, a privilege is given for damages caused by carelessness, negligence or want of skill in the management of any steamboat or other water craft; and on this privilege a provisional seizure taken out on proper affidavit and bond.

Howes vs. Steamboat Red Chief, 15 A. 325.

(B) Seizure does not confer privilege. It exists independently.

Hence it may be enforced—

- (a) Where there is no seizure because property is already in *custodia legis*.

Robinson vs. Staples, 5 A. 712.

- (b) Where property can be found, even though released on bond—the bond not extinguishing the lien.

Conrad vs. Petzelt, 29 A. 477.

- (c) Where privilege is not recognized in the judgment.

Hill & Co. vs. Bourcier, 29 A. 841.

- (d) Where said privilege attaches to proceeds of property on which it rested.

Harman vs. Judge, 6 A. 768; Vaught vs. City, 12 A. 839; Case vs. Kloppenberg, 71 A. 482.

(C) See, to the effect that sequestration and provisional seizure is effectual until ripened into judgment.

Aymar vs. Lawrence, 1 L. 397.

(D) Does not lessor's lien attach to insurance money?

Thayer vs. Goodale, 2 L. 519; Aymar vs. Lawrence, 1 L. 397; Werlein vs. Insurance Co., 30 A. 1399.

(E) In case of failure or death of lessee lien and privilege does not extend beyond one year.

Act 128 of 1894.

(F) Manner of forcing tenants to give possession.

Act 23 of 1894.

286. Executory Proceedings—The manner of conducting executory proceedings will be provided hereafter.

G. P. 732.

287. Lessor's Right to Writ—Affidavit—Lessee's Right to Bond—Appraisement—When a lessor sues for rent whether the same be due or not due, he may obtain the provisional seizure of such furniture or property as may be found in the house, or attached to the land, leased by him; and in all cases it shall be sufficient to entitle the lessor to said writ, to swear to the amount which he claims whether due or not due, and that he has good reasons to believe that said lessee will remove the furniture or property on which he has a lien or privilege out of the premises, and that he may be thereby deprived of his lien provided, that in case the rent be paid when it falls due the costs of seizure shall be paid by the lessor, unless he prove that the lessee did actually remove, or attempt to intend to remove, the property out of the premises; pro

that in all cases of provisional seizure of furniture or property at the instance of lessors, the lessee be permitted to have the seizure released upon executing a forthcoming bond or obligation, with a good, ratable security for the value of the property to be left in possession, or for the amount of the claim, with interest and costs; provided, further, that the value of the property shall be fixed by the sheriff, or one of his assistants, with the assistance of two appraisers selected by the parties, twenty-four hours' notice being previously given to the lessor or his counsel to select an appraiser.

S. 294, 541, 2159, 2161, 2162, 2165, 2578, 2901, 2908, 2910, 2911; C. P. 244, 221, 214, 275, 280; 217, 237, 245, 276, 285, 645; C. O. 2707, 2709.

When debt not due.

Writ may issue though debt be not due.

Thomas vs. Dundas, 81 A. 184; Wilcoxon vs. Bowles, 1 A. 280.

But plaintiff liable for costs, if defendant make valid tender when rent is due and had no intention to remove property.

Stillman vs. Bryant, 15 A. 175.

Affidavit.

Affidavit must be by plaintiff or lawful agent; unauthorized third person can not make it.

Fernandez vs. Miller, 26 A. 120.

Mere non-payment of rent justifies affidavit.

Dillon vs. Poirier, 84 A. 1100; 8 A. 366; 23 A. 888.

What is seizable.

Working animals, carts, plantation supplies on the place, though nominally sold to a third person.

Washburn vs. Frank, 81 A. 427; Davis vs. Thomas, 28 A. 840; Worrell vs. Vicker, 80 A. 202; Denistown vs. Mallard, 2 A. 14.

Any property of debtor in the place not exempted by C. O. 2705, to-wit: His clothes and linen, those of his wife and family; his bed, bedding and bedstead, and those of his wife and family; his arms, military accoutrements, and the tools and instruments necessary for the exercise of his trade or profession. All other property may be seized.

Stewart vs. Laoume, 80 A. 157.

Promissory notes of lessee found on premises.

Succession of Stone, 81 A. 511.

4. Any property when on leased premises permanently, but not property of under-tenant who owes nothing to lessee.
Goodrich vs. Bodley, 35 A. 526; University Publishing Co. vs. Piffet, 34 A. 602.
5. Property of sub-lessee indebted to lessee found on premises. Seizure operates only to extent of indebtedness.
Simon & Frank vs. Goldenberg, 15 A. 229.

(D) *What may not be seized.*

1. Such property as belongs to under-tenant who owes nothing to lessee.
O. C. 2708; University Publishing Co. vs. Piffet, 34 A. 602; Kittredge vs. Ribas, 18 A. 718; Powers vs. Florance, 7 A. 524.
2. Or to third person owing nothing, and sending property to leased premises transiently and for limited purpose.
Rea vs. Burt, 4 L. 689.

(E) *Conflict between Seizing Lessor and Intervenor:*

1. Lessor prevails.
 - (a) Where workman making repairs on sugar house claims priority of privilege over lessor on the crop.
Saloy vs. Dragon, 37 A. 73.
 - (b) Where factor claims superior lien.
Carroll vs. Bancker, 43 A. 1194.

But see to effect that lien of merchant furnishing supplies is equal in rank with that of lessor.
Mason vs. Murray, 21 A. 535; Cory vs. Eddins 13 A. 444; Hollander vs. Creditors, 6 A. 669.

2. Intervenor prevails.

When plantation laborer claiming privilege on crop.
Saloy vs. Dragon, 37 A. 73.

(F) *Dissolution of writ.*

Writ is dissolved in two ways.

- (a) By bonding.
O. P. 289.
- (b) By motion to dissolve.
Browne vs. Clarke, 35 A. 290.

(G) *When writ dissolved.*

1. When lessee offered to pay rent and tendered cotton before writ issued.
Browne vs. Clarke, 35 A. 290; Fox vs. McKee, 31 A. 67.
2. When facts alleged to justify writ are false.
McCarty vs. Lepaullard, 4 R. 425; Salter vs. Duggan, 4 A. 290; Thomas vs. Dundas, 31 A. 196.

damages are allowed.

When plaintiff had good reason to apprehend purpose to remove the property subject to the privilege.

Dillon vs. Poirier, 84 A. 1100; Thayer vs. Waples, 26 A. 502.

Where rent was not paid, even if defendant had no fraudulent intention, which is not an essential element in the case.

Martin vs. Dickson, 85 A. 1036; Lalaurie vs. Woods, 8 A. 866; Shift vs. Ezekiel, 23 A. 883.

Where seizure is maintained.

Murphy vs. Redler, 16 A. 1; Mulhaupt vs. Enders, 88 A. 744.

damages are allowed.

When writ is set aside for having been issued after tender of rent, though rent had been demanded in vain two days previous.

Fox vs. McKee, 81 A. 67.

Actual damages.

When there is no malice, only actual damages recovered.

Fox vs. McKee, 81 A. 67; Cretin vs. Levy, 87 A. 183.

Penalties of damages.

Penalty fees exclusively in reference to dissolving writ.

Penny vs. Taylor, 5 A. 714; Cretin vs. Levy, 87 A. 183; Phelps vs. Coggeshall, 18 A. 440; Accessory Co. vs. McCerren, 18 A. 214.

Dissolution res judicata as to damages:

Dissolving writ is *res judicata* on question of wrongful seizure.

Block vs. Meyers, 85 A. 220; Barrimore vs. McFeeley, 52 A. 1182; Roos vs. Goldman, 86 A. 188.

But suppose writ is dissolved for some cause happening subsequently; it would seem foregoing rule should not apply.

Butchers' Union and Slaughter House Co. vs. Howell, 87 A. 280.

Removal Within Fifteen Days—The lessor may even in the hands of a third person, such furniture in the house leased, if the same have been removed by the lessee, provided he declare on oath that the same were removed without his consent, within fifteen days from the date of his suit being brought.

Constitution of 1838, Art. 123.

1. This article does not apply to the factor of the lessee; he is not a third person.

Tupery vs. Edmondson, 32 A. 1149.

2. And lessor's lien follows crop into hands of factor and attaches to proceeds.

Carroll vs. Bancker, 48 A. 1194.

3. Lessor could not, under former jurisprudence, seize property removed, sold and delivered to third person.

Desbau vs. Picket, 16 A. 350.

But under Act 46 of 1886, he may seize, and in answer to intervention of such third person allege and prove simulation and fraud.

289. Seizure of Ships, Vessels, etc.—When and by Whom—Sailors or other persons employed on board of any ship, vessel, or other water craft trading within the State, as well as persons who have furnished materials for or made repairs to such vessels or crafts, may, at the same time they bring their action against the captain, master, or consignees of such vessels or crafts, for the amount due to them, obtain the provisional seizure of such vessels or crafts, to secure the amount of their claims, provided they state on oath, at the foot of their petition, that the sum sued for (specifying the amount of the same) is really owing; that such vessels or crafts are on the eve of leaving the jurisdiction of the court, and that they are apprehensive of losing the amount they claim should such vessels or crafts depart previous to their demand having been satisfied.

Such seizure may be made even of ships or vessels trading out of the State, at the suit of persons claiming payment for materials furnished for or repairs made to such ships or vessels.

Bonding by Defendant—Whenever ships, vessels, or any other property, are provisionally seized, the defendant shall be permitted to have the seizure set aside on executing his obligation, with a good and solvent security,

whatever amount the judge may determine as being to the value of the property to be left in his possession, the condition of said bond to be that he will satisfy judgment as may be rendered against him, or return property.

Bonding by Intervenor—And when the defendant does bond said property within ten days, the intervenor losing the ownership of the property, his agent or attorney, shall have the right to give similar bond and serve to the sheriff, as required in this article from the defendant, and to take the property seized in his possession.

P. 276, 285, 724, 1127; R. S. 543, 638, 2902, 2908, 2914, 2915, 3672, 3674; C. C. 5287, 5289.

Seizure of boats, etc.

Boat running exclusively within the State may be provisionally seized.

Dejona vs. Steamboat Osceola, 17 A. 277; Henning vs. St. Helena, 5 A. 332.

Boat trading out of State may also be seized.

Id.

But only to enforce a lien not maritime, *i. e.*, a lien on a vessel at home port. Lien on foreign vessel is maritime and cognizable only in the admiralty court.

22 A. 388; Berwin vs. Matanzas, 19 A. 387; Southern Dry Dock Co. vs. Steamboat Perry and Owners, 23 A. 39; DeHarde vs. Bark Magdalena, 24 A. 267; The Moses Taylor, 4 Wall. 411; Haeberle vs. Barringer, 29 A. 410; The Hine, 4 Wall. 535.

Bonding.

By defendant.

By intervenor claiming as owner, pledgee or consignee when defendant fails within ten days to bond.

Act 51 of 1876, p. 92.

By plaintiff when defendant fails to bond within ten days.

Act 19 of 1877.

Terms of bond.

Plaintiff's bond must be conditioned.

(a) That he will satisfy whatever judgment be rendered against him or return the property.

(b) That he binds himself for the amount of the claim or the value of the property.

(c) That he will pay any judgment rendered against him
Conrad vs. Patzelt, 29 A. 465.

(D) Effect of bonding. Fifteen day rule.

Bonding does not:

(a) Release property from privilege, and privilege may be enforced on second seizure within fifteen days after transfer to a third person.

Haralson vs. Boyle, 22 A. 210; Conrad vs. Patzelt, 29 A. 476; Haralson vs. Jenks, 28 A. 707.

(b) And even after fifteen days, when such transfer is simulated or fraudulent, which seizing plaintiff may allege and prove under Act 46 of 1886, in answer to intervention or third opposition of third person.

(c) Act 46 of 1886 changes former jurisprudence.

St. Charles Hotel Co. vs. Tarbox, 23 A. 715; Delband vs. Pickett, 1 A. 351.

(d) But the property of a third person is subject to lessor's privilege only while on leased premises, and is lost at any time after removal. Fifteen days rule applies only to property of lessor.

Merrick, Race & Foster vs. Lattache, 27 A. 87.

(E) Rights of surety.

1. He may defend:

(a) That bond of release not signed by principals.

Benham vs. Collins, 23 A. 222; King vs. Baker, 7 A. 571; 16 L. 176.

(b) That bond was unauthorized by law and party suing was no party to said bond.

Urquhart vs. Carvin, 25 A. 218.

(c) That necessary steps have not been taken against the principal.

Lepretre vs. Barthet, 25 A. 124.

2. Previous steps against principal not necessary:

When he becomes insolvent or when he dies.

Murison vs. Butler, 20 A. 518; Alley vs. Hawthorn, 1 A. 122; Trimble vs. Birshta, 11 A. 271.

290. Proceeding in Rem—One to whom the nature of his claim or the law gives a privilege on a thing, either lost or abandoned by its owner, or whose owner is either unknown or absent, may proceed against the thing itself or

he has a privilege, and have the same seized and satisfy his claim, pursuant to the forms hereafter ed.

Petition—Oath—Prayer—The creditor who pro-
rem, in the manner prescribed in the preceding must present a petition to a competent judge, stat-
oath, at the foot of the same, the amount and the
of his demand, that the thing on which he has his
e has been either lost or abandoned by the owner,
e name he is ignorant, or that it belongs to some
nown to him or absent. He must pray, besides,
thing be seized and sold to satisfy his claim and
he costs of the suit.

Order for Writ—Notice by Sheriff—The court to
uch petition shall be presented may, if the case ap-
them one in which the plaintiff is allowed to pro-
rem, order that the sheriff shall seize and take
on of the thing, directing, at the same time, that
notice be given to all persons interested, to appear
fteen days to answer to the petition so presented.

25, 180.

Advertisements of Notice—The sheriff must give
ice by advertisements, published three different
n the official paper, if any be published in the
e, or by affixing the same at the usual places, if
no newspaper published in the place.

00.

t of judgment in rem.

gment binds only the specific property seized.

Carroll vs. Banker, 48 A. 1194.

ut when owner of property seized by process *in rem* ap-
ars and defends, a judgment *in personam* may be asked
r and granted by proper amendment.

Holmes vs. Steamer Chieftain, 1 A. 136.

(B) Substituted process not constitutional—when:

Substituted service of process on a curator *ad hoc* will not bring an absent defendant into court, where no property is brought within the court's jurisdiction by seizure.

Laughlin vs. Ice Co., 35 A. 1184; *Pennoyer vs. Neill*, 95 U. S. 714; *Hartness vs. Hyde*, 98 U. S. 478; *Brooklyn vs. Ins. Co.*, 99 U. S. 363.

(C) Silence of judgment as to privilege.

1. Privilege not lost because not specifically recognized in the judgment.

Hill & Co. vs. Boucler, 29 A. 841; *Love vs. Voorhies*, 15 A. 549; 53 A. 181; 81 A. 264.

2. *Aliter* where seizure, not nature of the debt, confers the privilege or preference.

Succession of Caldwell, 8 A. 42; *Gustine vs. Union Bank*, 10 R. 4; *Holmes vs. Holmes*, 9 R. 118.

294. Advocate for Absent Owner—At the expiration of such delay, if no one appear to answer the petition the plaintiff may require that an advocate be appointed to defend the absent owner, and after having obtained judgment as in ordinary suits, the property may be sold in execution, in order that the amount of his demand be paid out of the proceeds.

295. Provisional Seizure Issues Without Bond—The plaintiff shall not be required to give security, in order to obtain the provisional seizure of the thing which he holds in pledge, or on which he has a privilege, in any of the cases mentioned above, but he shall be personally responsible for all damage suffered by the defendant, should the seizure have been wrongfully obtained.

§ 5

Of Injunction.

296. Writ of Injunction—Injunction, or prohibition, is a mandate obtained from a court, by a plaintiff, prohibiting one from doing an act which he contends may be injurious to him or impair a right which he claims.

17 A. 306; C. P. 237, 845, *et seq.*

o may issue.

Orders of court may issue in absence of judge.

Act 106 of 1880: Act 43 of 1882; see 15 A. 528.

Mandatory injunction.

Injunction is mandatory as well as preventive.

Black vs. Good Intent Tow Boat Co., 31 A. 497; **Pierce vs. New Orleans**, 18 A. 242.

But mandatory writ issues only after hearing, or when ancillary to main injunction.

Black vs. Good Intent Tow Boat Co., 31 A. 497; **McDonough vs. Callo-way**, 7 R. 442; **Barrett vs. City**, 33 A. 512; **Yale & Co. vs. Judge**, 44 A. 519.

State or Federal courts.

Injunction of State courts by Federal courts:

No such injunction will issue.

Goodrich vs. Hunton, 29 A. 377; **Diggs & Keith vs. Wolcott**, 1 Cranch, 179; **Peck vs. Jenness**, 7 How. 625; **Harris vs. Carpenter**, 1 Otto, 254.

Nor can State courts enjoin a Federal execution or seizure.

Brooks vs. Montgomery, 28 A. 451; **Freeman vs. Howe**, 24 Howard, 453.

Lower court against appellate court.

Injunction of execution of judgment of Supreme Court by lower courts:

(a) Lower courts may enjoin proceedings in execution not warranted by terms of judgment.

State ex rel. Sentell vs. Judge, 38 A. 32; **State ex rel. Southern Bank vs. Pillsbury**, 35 A. 405.

(b) But where mode of execution is part of decree or judgment, it can not be enjoined.

Stafford vs. Benshaw, 33 A. 443.

Injunction to Criminal by Civil District Court.

such injunction lies.

Arthurs vs. Sheriff, 48 A. 414; **State ex rel. Walker & Merz vs. Judge**, 39 A. 135.

Against whom writ may issue.

City and municipal agencies, such as Police Board, may in proper cases be enjoined.

Lottery Co. vs. New Orleans, 24 A. 83.

(G) Rule nisi.

1. Rule nisi should not issue where plaintiff is absolutely entitled to injunction.

Beebe vs. Guinault, 29 A. 796, 57; Sinnott vs. Rochereau & Co., 34 A. 794; State ex rel. Behan vs. Judge, 32 A. 1277.

2. No evidence touching merits can be received. Whole case determined on face of papers.

Heyniger vs. Hoffhung, 29 A. 57; Watson vs. Bondurant, 30 A. 7.

(H) Revoking injunction.

Notice to enjoining party essential.

Pike vs. Bates et al., 34 A. 391; Gravais vs. Falgoust, 34 A. 39; Claffin vs. Lisso & Scheen, 31 A. 171; Martin vs. Thiery, 29 A. 362.

(I) Duration of injunction.

When issued without restriction as to time, injunction continues in force until modified or discharged.

State ex rel. Waterworks Co. vs. Judge, 35 A. 941.

(J) Practice.

Equity practice followed where no specific rules established.

Black vs. Towboat, 31 A. 493.

(K) Code broader than equity.

Codal provisions broader than practice under the equity practice.

Levy vs. Waterworks, 38 A. 29.

(L) Conditional injunction.

Writ may be decreed to operate only in certain contingency, or during continued existence of certain condition.

Levine vs. Michel, 35 A. 1121.

(M) Restraining order.

Where Supreme Court directs lower court to enjoin, it may issue a temporary restraining order.

State ex rel. Murray vs. Judge, 36 A. 582.

(N) Alias injunction.

1. Second writ can not issue on grounds not pleaded in first.

Porter vs. Morere, 30 A. 231; 34 A. 739; Fluker vs. Davis, 12 A. 513; McMicken vs. Morgan, 9 A. 208.

2. *Aliter* when first writ is dissolved, merely as of non-suit.

Wells vs. Hunter 5 N. S. 120; Levistone vs. Bona, 4 R. 439; Citizens' Bank vs. Crooks et al., 21 A. 324.

(O) Injunction by defendant in same suit.

Prior resort to writ by one party will not bar other from resorting to same process.

Wells vs. City, 32 A. 678.

To Whom Writ Directed—The injunction may be directed either against the defendant in the suit, or against persons not parties to it.

Injunction Against Defendant—Grounds for Relief—An injunction must be granted, and directed against the defendant himself, in the following cases:

Obstruction of Public Place—When the defendant is engaged in the act of building or constructing some work tending to obstruct a place of which the public has the use.

Obstruction of Beds or Banks of Navigable Rivers—When the defendant is constructing, either within the bed of a navigable river or on its banks, works which may obstruct the navigation of such river, or render it more difficult, or prevent ships or other crafts from easily landing and unloading on the bank of such river.

Building on Real Estate Claimed—When the defendant has commenced some building or some other work on a real estate, the ownership or possession of which is contested by the plaintiff, or pretends that such building or works would be injurious to his interest.

Opposition to Execution of Public Works—When the defendant opposes the execution of works necessary for the repairs of public levees, dikes, roads, bridges, drains, and the like.

Disturbance of Plaintiff in Possession—When the defendant disturbs the plaintiff in the actual and real possession of which such plaintiff has had for more than one year, either of a real estate or of a real right, of which he claims either the ownership, the possession or the enjoyment.

Disposition of Property by Husband Pending Wife's Suit—When a woman has sued her husband for a separation of property, or for a separation from bed and board, she may demand that he will, during the pendency of the suit,

dispose, to her prejudice, of the property either held in the community or on which she has a privilege for her dotal rights.

7. Seizures by Sheriff of Property of Third Persons, or other Illegal Acts—When the sheriff, in execution of a judgment, has seized property not belonging to the defendant, and insists on selling the same, disregarding the opposition of him who alleges that he is the real owner, or is guilty of any other illegal act in the execution of his office.

8. Disposition of Property Claimed Pending Suit—When the ownership of an estate, real or personal, is in dispute, and the plaintiff fears that the defendant, who is in possession of such property, may take advantage of his possession to sell or to dispose of such property in any other manner during the pendency of the suit.

9. In Case of Eviction of Purchaser—On the application of any purchaser, whose property is seized for the payment of the price of a thing sold to him, whenever suit has been instituted against him for the recovery of the property.

10. Arrest of Execution on Ground of Payment, Compensation, etc.—To stay execution when payment is alleged to have been made after judgment rendered, when compensation is pleaded against the judgment, or where the sheriff is proceeding on the execution contrary to some provision of law; provided, that no judgment or execution shall be enjoined on an allegation of compensation, setoff, or subsequent payment, except for the amount of such sum plead in compensation, setoff, or payment, as shall be established by the defendant, according to law; and such judgment, for any surplus that may exist, shall be executed in all respects as if no such injunction had been granted; and provided further, that whenever an

ion is granted on an allegation of compensation, or payment, it shall be the duty of the judge to require from the person claiming such injunction, a bond or security in double the amount of the sum alleged to have been paid, conditioned for the payment of damages in case the injunction shall have been wrongfully obtained.

1749, 1750; C. O. 866; C. P. 613, 46, 50, 395, 748, 749, 750.

Injunction will issue:

To enjoin wife to enjoin seizure of her separate property by creditors of her husband.

Atkinson vs. Atkinson, 15 A. 491.

When execution of judgment goes beyond its terms.

Labauve vs. Slack, 81 A. 134.

When plaintiff wishes to suspend payment of price of property when he is threatened with eviction.

State ex rel. Jacobs vs. Judge, 40 A. 208; Walker vs. Cucullu, 15 A. 689; Davis vs. Millaudon, 14 A. 868.

To restrain defendant from paying money due plaintiff to a third person who is insolvent.

Denson vs. Stewart, 15 A. 456.

To restrain executory process where an action *quantum meruit* had been filed.

Walker vs. Cucullu, 15 A. 689.

To restrain further proceedings on *fi. fa.* in excess of legal amount.

Harper vs. Terry, 16 A. 216.

To restrain police jury from building over a navigable stream a bridge which obstructs navigation.

Ingram vs. Police Jury, 20 A. 228.

To restrain defendant from obstructing public canal.

State ex rel. Syndio vs. Judge, 41 A. 560.

To restrain obstruction of alley way.

McDonough vs. Calloway, 7 B. 442.

To restrain obstruction to common passage way or to common drain.

State ex rel. Yale vs. Duffel, 41 A. 516.

To compel closing of opening already made in wall held common. This is a mandatory injunction and is allowed.

McDonough vs. Calloway, 7 B. 442; Pierce vs. City, 18 A. 242.

12. To abate a nuisance.
Dudley vs. Tilton, 14 A. 284; Bruning vs. New Orleans Canal, 12 A. 543;
Durant vs. Riddell, 12 A. 746; Herbert vs. Benson, 2 A. 771; Akin vs.
Bedford, 5 N. S. 501.
13. To restrain defendant from seizing and selling property to
satisfy purchase price when plaintiff has been evicted.
State ex rel. Jacobs vs. Judge, 40 A. 206; Davis vs. Millaudon, 14 A. 988;
Banaux vs. Cuzeaux, 17 L. 76.
14. To restrain Levee Board from collecting a tax alleged to
be unconstitutional.
State ex rel. Gaynor vs. Judge, 38 A. 926.
15. To prevent Waterworks Co. from turning off water supply
when lawful charges are tendered.
Callery vs. Waterworks Co., 35 A. 800; Ernst & Co. vs. Waterworks
Co., 39 A. 550; Levy vs. Waterworks Co., 38 A. 25.
16. To restrain destruction of forest trees on land claimed by
plaintiff.
Delacroix vs. Villere, 11 A. 39.
17. To restrain fraudulent possessor of note from using it in
evidence.
Lannes vs. Courege, 51 A. 74.
18. To restrain emptying of nuisance boat in river, polluting
plaintiff's water supply.
Waterworks Co. vs. User, 36 A. 918.
19. To restrain members of Masonic fraternity from illegally
excluding fellow members.
Knabe vs. Fernot, 14 A. 847.
20. To restrain partner of an editor from interfering with his
full editorial control.
Puckette vs. Hicks, 39 A. 901.
21. To restrain judgment debtor from paying plaintiff's in-
terest in judgment to third person.
Bawlings vs. Bowie, 33 A. 578.
22. To restrain city from diverting funds to other purposes
than those specified in the budget.
Shotwell vs. City, 36 A. 940.
But such injunction lies only where plaintiff has a valid
claim and injunction is necessary to protect it.
State ex rel. Johnson vs. City, 41 A. 71.
23. To restrain defendant from carrying on a business other
than as partner of plaintiff in pursuance of valid or subsist-
ing contract of partnership.
Levine vs. Michel, 35 A. 1121.

4. To suppress a blacksmith shop ordered closed by city ordinance.

New Orleans vs. Lambert, 14 A. 244.

5. To suppress a conspiracy to defy the laws.

State ex rel. Belden vs. Fagan et als., 22 A. 546.

6. To restrain sale of a piece of property when plaintiff in injunction claims that defendant in execution has no interest therein.

Poincy vs. Burke, 28 A. 673.

7. To prevent burning of brick kiln where it causes much inconvenience and is source of danger.

Fuseller vs. Spalding, 2 A. 773.

8. To prevent a trespass, but only when such actual trespass is established.

Woods vs. Kirkland, 2 A. 337.

9. To prevent execution of mortgage on community property granted by administrator pending administration.

Ledoux vs. Breaux, 27 A. 190.

0. To prevent any act which, if performed, would result in damages to plaintiff.

Slaughterhouse Co. vs. Larrieux, 30 A. 799.

1. To prevent defendant from obstructing and closing avenues leading to cemetery lots of plaintiff.

Burke vs. Wall, 29 A. 40.

2. To prevent sheriff from paying to execution creditor of an insolvent where other creditors desire to share ratably.

Campbell vs. Creditors, 3 R. 106.

3. To restrain disposition of property claimed pending the suit.

Lowell vs. Cox, 3 R. 69.

4. To restrain sale of property obtained at instance of executor for purpose of partition where heirs wish a division.

State ex rel. Moore vs. Judge, 31 A. 302.

5. To restrain adverse claimant to office (levee commissioner) from inducting himself, extra-judicially, into office and thus oust the *de facto* officer, otherwise than by concurrent action with other members of the board.

Goldman vs. Gillespie, 43 A. 33; Guillotte vs. Poincy, 41 A. 333.

6. To restrain defendant from obstructing canal, or from interfering with commissioners in removing or causing to be removed obstructions therein.

State ex rel. Syndic vs. Judge, 41 A. 553.

87. To restrain waterworks company from interfering or hindering plaintiff from taking his water supply from pipes and fire plugs where he has such under contract with the company.

Callery vs. Waterworks Co., 85 A. 801.

88. To restrain a third person in possession of a sum of money claimed by plaintiff from paying it to insolvent defendant.

Denson vs. Stewart, 15 A. 456.

(B) An injunction will not issue.

1. To restrain defendant from appealing to the courts.

Association vs. Cutler, 26 A. 500; Wells vs. City, 82 A. 676; Bonin vs. Monnot, 28 A. 597; State ex rel. Sweeney vs. Judge, 40 A. 1, 39 A. 619; Devron vs. Municipality, 4 A. 11; Brott vs. Eager, Ellerman & Co., 28 A. 263; Lannes vs. Courege, 31 A. 74; Hall vs. Egelly, 35 A. 312.

2. To restrain violation of contract for personal service.

Healey vs. Dillon, 39 A. 503; Healey vs. Allen, 38 A. 867; Seiler vs. Fairex, 23 A. 897.

3. To oust one in possession of property.

New Orleans & Northeastern R. R. vs. R. R. Co., 36 A. 561.

4. To restrain lessee from using wagon for the conveyance of goods and effects over leased premises when such use is indispensable.

New Orleans City R. R. vs. McCloakey, 35 A. 784.

5. To restrain a person from doing an act which is not in progress or impending—an act which is too remote to be appreciated.

State ex rel. Keiffer Bros. vs. Judge, 34 A. 89.

And where act complained of is no longer contemplated, injunction suit will be abated even on appeal.

Browne vs. New Orleans, 38 A. 517.

6. To restrain municipal corporation from passing an ordinance.

Harrison vs. City, 33 A. 222.

7. To try the question of eligibility to public office.

State ex rel. Cheevers vs. Duffel, 32 A. 649.

8. To prevent an election directed by law to determine whether a tax should not be voted in aid of a public improvement.

Roudanez vs. Mayor, etc., 29 A. 772.

9. To cause defendant to undo what he has already done.

Trevigne vs. Rogers, 31 A. 105.

To cause defendant to do an act militating against the already acquired jurisdiction of another court.

State ex rel. Gas Light Co. vs. Judge, 87 A. 400.

To restrain police jury from employing an attorney.

Gervais Leeche vs. Police Jury, 87 A. 195.

To restrain defendant from pursuing a lawful business open to all the world.

State vs. American Cotton Oil Trust, 40 A. 8.

To restrain city council from impeaching city officers.

State ex rel. Behan vs. Judges, 85 A. 1080.

Or to restrain the exercise of any legal right.

Darcantel vs. Slaughterhouse Co., 44 A. 633.

To prevent an apprehended nuisance which is purely prospective, and danger from which is not imminent.

Bell vs. Biggs & Bro., 38 A. 556.

To prevent as a nuisance operation of a whiskey distillery established under authority from the city.

Lewis vs. Behan, 28 A. 180.

To restrain mayor from signing an ordinance.

New Orleans Elevated R. R. Co. vs. Mayor, etc., 39 A. 127.

To compel mayor and council to budget plaintiff's judgment and provide for payment. Remedy by mandamus.

Barrett vs. City, 83 A. 542.

To restrain execution pending devolutive appeal on grounds presented by the appeal.

O'Connor vs. Sheriff, 80 A. 441.

To restrain order of seizure and sale when grounds alleged could be presented on appeal.

Naughton vs. Dinkgrave, 26 A. 588; Shreveport vs. Flournoy, 26 A. 708.

Where remedy of complaining party—i. e., a mortgagee, is by third opposition.

James vs. Breau, 26 A. 245; Smith & Co. vs. Hoey, 28 A. 95; White vs.

Blanchard, 19 A. 62; Robinson vs. Haynes, 19 A. 182.

To reduce alleged excessive seizure.

Heffner vs. Hesse, 29 A. 149.

To restrain city from collecting license from plaintiff,

City vs. Becker, 81 A. 645.

Or from enforcing police ordinances in interest of order and health.

Hottinger vs. City, 42 A. 629.

To restrain sale of community property ordered on application of administrator of husband's estate.

Branson vs. Balch et als., 19 A. 40.

24. To restrain debtor from selling his property when his insolvency is purely prospective.

Barriere vs. Fiste, 9 A. 536; *United States vs. Smith*, 7 A. 189.

25. To enforce a secondary remedy where there is no primary demand.

State ex rel. Johnson vs. Oity, 41 A. 71.

(C) *Right of injunction absolute.*

1. In specific instances recited in C. P. 298 to 302 the judge can not refuse injunction.

Beebe vs. Guinault, 29 A. 795; *R. R. Co. vs. Judge*, 36 A. 395; *Bank vs. Webre*, 44 A. 1081; *Behan vs. Judge*, 32 A. 1276; *Slaughterhouse Co. vs. Larrieux*, 30 A. 799; *State ex rel. Gaynor vs. Judge*, 38 A. 924; *State ex rel. Jacobs vs. Judge*, 40 A. 206; *Sinnot vs. Rochereau*, 34 A. 784; *State ex rel. Murray vs. Judge*, 36 A. 578.

2. But under C. P. 303 judge has discretion of granting or refusing injunction in all other cases, and can not be controlled by mandamus.

New Orleans vs. Telegraph Co., 37 A. 573; *Polar Star Lodge vs. Judge*, 16 A. 234; *State ex rel. Savage vs. Judge*, 38 A. 916; *State ex rel. Padron vs. Judge*, 31 A. 794; *Yale & Co. vs. Judge*, 41 A. 518.

(D) *Mandamus lies to coerce granting of injunction when plaintiff clearly entitled thereto.*

Gaynor vs. Judge, 38 A. 924; *Carre vs. Judge*, 43 A. 1133; *Jacobs vs. Judge*, 40 A. 206.

(E) *Injunctions against executory process.*

C. P. 739 and 740.

1. For what causes injunction will lie:

Fraud and payment.

Comer vs. Zunts, 14 A. 374.

2. For what causes it will not lie:

That usurious interest paid more than one year prior has canceled debt.

Mullen & McGowen vs. Hart, 31 A. 677.

3. No bond necessary; but plaintiff in injunction must come strictly within the terms of C. P. 739 and 740. He is not entitled to an injunction without bond when he merely alleges:

(a) That obligation was null *ab initio*.

Hodgson vs. Roth, 33 A. 944.

- (b) And evidence under injunction proceedings issued without bond is restricted to one of the causes enumerated in C. P. 739 and 740, no matter how many grounds may be alleged.

Berens vs. Boutte, 81 A. 112; Williamson vs. Richardson, 80 A. 1178; Lamoree vs. Succession of Cox, 82 A. 246.

- (c) But it seems that executory process can only be arrested at instance of debtor by alleging one of the causes set forth in C. P. 739.

Dupre vs. Anderson, 45 A. 1134.

Injunction against execution of judgments; what court may issue.

1. Usual rule:

- (a) Only court issuing execution can enjoin it.

Steven-on vs. Weber, 29 A. 104, 875; State ex rel. Keiffer Bros. vs. Judge, 84 A. 89; Dufossat vs. Berens, 18 A. 339; Donnell vs. Parrott, 18 A. 253; Brooks vs. Montgomery, 28 A. 450; State vs. Judge, 16 A. 233.

- (b) Particularly when execution is levied within territorial limits of court.

Ogler vs. Dannoy, 7 N. S.; Spalding, Bidwell & McDonough vs. Rosewood, 26 A. 341.

- (c) But administrator illegally controlling execution may be enjoined in another court from so acting.

Brown vs. Brown, 80 A. 506.

2. Exception.

- (a) Execution issuing from court of another parish may be enjoined where levied. The exception is *ex necessitate*.

Jack vs. Harrison, 84 A. 786; Coleman vs. Brown, 16 A. 110; Brien vs. Loftus, 8 R. 163; Aronstein vs. Weber, 20 A. 199; 21 A. 199; 19 A. 206; 5 A. 648; 4 A. 84; 2 A. 823, 492.

- (b) But not before actual execution.

Keiffer Bros. vs. Judge, 84 A. 89.

- (c) And defendant residing here may in proper case be enjoined from prosecuting a suit in Mississippi.

Praeger vs. Micus & Co., 86 A. 75.

No injunction against judgment allowed when the sole allegation

1. That new evidence has been discovered.

Gusman vs. DePoret, 83 A. 833; Campbell vs. Briggs, 8 R. 110; Morrison vs. Crooks, 8 R. 273.

2. That no valid seizure was made.

Gusman vs. DePoret, 83 A. 833; Deville vs. Hayes, 28 A. 550; Calderwood vs. Prevost, 9 R. 182.

3. That seizure is excessive; remedy is by application for reduction.

C. P. 652; *Lambert vs. Sentell*, 38 A. 694; *Powell vs. Hayes*, 31 A. 769; *Buisson vs. Staats*, 9 A. 236; *Bagley vs. Tate*, 10 R. 45; *Burgess vs. Gordy*, 32 A. 1297.

4. That mortgage on which judgment was based had perempted. That issue is *res judicata*.

Hayes vs. O'Neill, 30 A. 1289.

5. That judgment was signed in vacation. Affidavit not showing that there was no consent.

27 A. 401; 23 A. 523; 26 A. 119; but see *Hernandes vs. James*, 23 A. 433; *Rust vs. Faust*, 15 A. 477; 21 A. 306; *Green vs. Reagan*, 33 A. 974.

6. That judgment is for more than is due.

Walker vs. Villavaso, 26 A. 45; *Stinson vs. Hill*, 21 A. 560.

7. That claim sued on had been settled.

Greene vs. Johnson, 21 A. 465.

8. That plaintiff pleads in compensation an unliquidated demand—e. g., claim for damages.

Pike vs. Wells, 24 A. 208.

9. That plaintiff has privilege on property seized; remedy is by third opposition.

Wallis vs. Bourg, 14 A. 104; *Van Loan vs. Heffner*, 30 A. 1213.

10. That debt had been paid before judgment.

Benton vs. Roberts, 3 R. 226.

11. That partial payment had been made.

Barrow vs. Robichaux, 15 A. 70.

12. That property seized belongs to person other than party enjoining.

Church vs. Sheriff, 33 A. 1461.

13. That execution was premature, when it appears that delays for suspensive appeal were waived.

Soule & Ward vs. Pollard, 14 A. 285; *Conner vs. Copeland*, 3 A. 433; *Leggett vs. Potter*, 9 A. 809.

Or when delays for suspensive appeal had expired.

Dayton vs. Commercial Bank, 6 R. 20; *Morgan vs. Whiteside*, 14 L. 280; 1 R. 497; *Leggitt vs. Potter*, 9 A. 309; *Hatch vs. English*, 12 R. 186.

(H) No judgment can be enjoined on grounds which might have been pleaded in defence.

1. Original judgment is *res judicata*.

Porter vs. Morere, 30 A. 230; *Rudman vs. Bookel*, 26 A. 376; *Mahan vs. Accommodation Bank*, 26 A. 84; *Gallagher vs. Michel*, 26 A. 41; *O'Connor vs. Sheriff*, 30 A. 441; *Benton vs. Roberts*, 3 R. 224.

2. But this rule does not apply:**(a) When defendant was not *sui juris*.**

Medart vs. Fasnacht, 15 A. 621; Balner vs. Burbridge, 15 A. 626;
Bowman vs. Kaufman, 30 A. 1024.

(b) When prospective consideration of judgment has failed.

Davidson vs. City, 34 A. 178; 32 A. 1248; Dickason vs. Bell, 18 A. 249.

(c) Where causes of nullity of judgment arise after the judgment is rendered, as where mother given custody of child subjects it to evil influences.

Lemonnier vs. McEarly, 87 A. 184.

(d) When conditions justifying a homestead no longer exist, judgment may be declared inoperative.

Denis vs. Gayle, 40 A. 286.

And must be declared inoperative before execution can issue.

Calvit vs. Williams, 35 A. 822; Anderson vs. Duson, 35 A. 917.

Execution of judgment may be enjoined, on the ground:**1. That surety on injunction bond not specifically condemned with plaintiff.**

Franz vs. Waggaman, 28 A. 514.

2. That judgment obtained by fraud.

Klein vs. Coon, 10 A. 522.

3. That property seized under execution belongs to plaintiff, but where his title is attacked as simulated or fraudulent, he must make clear proof.

Coreoran vs. Sheriff, 19 A. 139.

4. That property seized is public property.

City of Baton Rouge vs. Bird, 21 A. 244; Sheen vs. Stothart, 29 A. 680.

5. That judgment has been paid and extinguished by giving of drafts.

Woolfolk vs. Degejos, Durrive & Co., 24 A. 199.

6. That consideration of judgment recognizing drainage privilege has failed.

Davidson vs. City, 34 A. 170.

Injunction on bond is sole method of arresting execution of judgment, except suspensive appeal. Rule to show cause will not arrest execution.

Viley vs. Woodman & Bement, 19 A. 188, 210; State vs. Judge, 9 A. 802; State vs. Judge, 18 A. 110.

(K) Acquiescence in judgment destroys right to enjoin it.

Savole vs. Thibodaux, 29 A. 51.

(L) Effect of injunction of seizure:

Seizure is not released: On dissolution of injunction, sale proceeds.

Lamoreere vs. Succession of Cox, 52 A. 250.

(M) Appeal from order granting injunction.

No appeal lies unless injury be irreparable.

Fontellieu vs. Gates, 35 A. 833; *Doullert vs. Judge*, 29 A. 869; *Beebe vs. Guinault*, 29 A. 796.

(N) Test of appellate jurisdiction.

1. When writ is obtained by judgment debtor whose property is seized, amount of judgment is the test.

Holland vs. Beauchamp, 12 A. 784; *Smith vs. Ins. Co.*, 33 A. 1071; *Francisco vs. Gauthier*, 35 A. 838; *Endorn vs. Ludeling*, 34 A. 1024; *Bruneau vs. Haughton*, 16 A. 47.

2. When writ is obtained by third person, alleging that his property is seized to satisfy debt of another, value of the property is the test.

Testart vs. Belot, 33 A. 608; *Rhodes vs. Black*, 34 A. 406; *Munday vs. Lyons*, 35 A. 990.

299. Injunction Against Persons not Parties to a Suit—The injunction may be directed against third persons not parties to a suit, in the cases enumerated in the following articles.

300. Injunction Claiming Preference Over Seizing Creditor—The sheriff may be enjoined from paying to the plaintiff the proceeds of the property seized, if a third person oppose such payment, alleging that he is entitled to be paid out of such proceeds in preference to the plaintiff, having a previous hypothecation or privilege, or any other right by which he claims to be paid in preference to the plaintiff.

C. P. 401.

301. Injunction and Settlement in Concorso—The sheriff may be enjoined from paying the claim of the plaintiff out of the proceeds of the sale of the property seized, if a third person oppose such payment, alleging that the defendant had no other property to pay his debts, except

which had been seized, and pray that the proceeds of the same may be brought into court, to be distributed among the creditors of the defendant, according to the order of their respective privilege or hypothecation.

See 401, 402, 722.

Opposition.

Remedy of third person claiming priority over judgment creditor is by a third opposition.

Deneufbourg vs. Didion, 7 A. 344; *Dolard vs. Bayhl*, 36 A. 186; *Smith vs. His Creditors*, 21 A. 214; *Young vs. Municipality No. 1*, 5 A. 786; *Turner vs. Parker*, 10 R. 154; *Larthet vs. Hogan*, 1 A. 820.

Injunction Against Disposal of Property Pendente

If one be in possession of property, of whatever nature it be, whether the same was placed in his hands as a trustee or otherwise, and a third person claims the ownership of such property by a suit, such third person may obtain an injunction directed against the possessor of such property, prohibiting him from disposing of the same until the further order of the court.

Injunction to Preserve Property or Prevent Waste

Under Injurious Act—Besides the cases above mentioned, courts of justice may grant injunctions in all other cases when it is necessary to preserve the property in dispute during the pendency of the action, and to prevent the parties, during the continuance of the suit, from committing waste of the same, or from doing some other act injurious to the other party.

Injunction Against Seizure for Price, while Title to Thing Sold in

Dispute—In addition to the cases mentioned above, the court may grant an injunction, on the application of any person whose property is seized for the payment of the price of a thing sold to him, whenever a suit has been instituted against him for the said property.

When claiming injunction under this article, plaintiff must show either that he has a right of property in the thing, or that the act, if done, would give him right to damages.

McAdam vs. Rainey, 33 A. 108.

304. Petition—Affidavit—Bond—Surety—Liability

In order to obtain an injunction, the party applying for the same must present a petition to that effect to a competent judge, stating, under oath, the facts which, according to his belief, render an injunction necessary, annexing to his petition his obligation in favor of the defendant, for such sum as the court may determine, after having examined what injury the defendant may sustain from such injunction, with the surety of one good and solvent person residing within the jurisdiction of the court, to secure the payment of such damages as may have been sustained by the defendant, in case it should be decided that the injunction had been wrongfully obtained. And on the trial of the injunction, the surety on the bond shall be considered as a party plaintiff in the suit; and in case the injunction be dissolved, the court, in the same judgment, shall condemn the plaintiff and surety, (although that plaintiff be a third person enjoining the execution of a judgment between other parties,) jointly and severally to pay to the defendant interest at the rate of eight per cent per annum on the amount of the judgment, and not more than twenty per cent. as damages, unless damages to a greater amount be proved; and the sureties in such case shall not be allowed to avail themselves of the plea of discussion.

R. S. 1746, etc., 96, 463, 1753, 1754, 1759, 2354, 3715, 3724, 3735; C. P. 217, 307, 397, 739, 740; C. C. 3061.

(A) Requisites for obtaining injunction. Affidavit.**1. It must be direct, positive and unconditional.**

Herbert vs. Joly, 5 L. 52; Elder vs. City, 31 A. 503; Reboul's Heirs vs. Behrens, 5 L. 82; Canal Bank vs. Carriell, 3 A. 225; Terry vs. Stauffer, 17 A. 306; Judson vs. Connelly, 3 A. 466; Jewell vs. Jewell, 1 R. 31; Pontz vs. Bistes, 15 A. 262.

2. It is *prima facie* true and has evidentiary value; but is not conclusive.

Crescent City Slaughterhouse Co. vs. Butchers' Union, 33 A. 930; Crescent City Slaughterhouse Co. vs. Police Jury, 32 A. 1192.

It may be taken by agent.

Williams vs. Douglas, 21 A. 468; C. P. Art. 217.

It is sufficient if it state "that the facts and allegations of petition are true."

Lewis vs. Winston, Morrison & Co., 26 A. 707; Klein vs. Coon, 10 A. 522; Livingston vs. Dickson, 1 A. 523; Stanbrough vs. Scott, 1 R. 43.

Signature of judge to affidavit may be omitted when order refers to affidavit and is signed by the judge.

Lewis & Gist vs. Daniels, 23 A. 171; English vs. Wall, 12 R. 132.

Supplemental petition, urging additional grounds for injunction must be sworn to.

Richardson vs. Dinkgrave, 26 A. 651; Maillot vs. Martin, 15 A. 40.

parties to injunction must make oath and give bond.

Ambliss vs. Miller, 15 A. 713.

failure of one party to give bond will not affect the rights of a co-plaintiff who complies with all legal requisites.

State ex rel. Violet vs. Judge, 46 A. 78.

d.

who are exempt from giving bond.

(a) City of New Orleans.

R. R. Co. vs. City, 30 A. 971; Wells vs. City of New Orleans, 20 A. 800.

(b) Plaintiff enjoining under C. P. 739 and 740.

Hodgson vs. Roth, 33 A. 944.

giving of bond by agent.

Agent must clearly have authority.

Walden vs. Peters, 1 R. 457.

And agent can execute only when principal is absent.

Bank of Louisiana vs. Wilson, 19 A. 8; Goodin & Husband vs. Allen, 12 A. 448; Marais vs. Sheriff, 44 A. 884.

amount of bond.

As fixed by the lower judge in his discretion.

Bell vs. Riggs & Bro., 37 A. 818; Green vs. Huey, 23 A. 704.

May be increased by him on rule.

Id.

May be in blank.

Mason vs. Fuller, 12 A. 63.

May be construed by reference to petition and affidavit.

R. R. Co. vs. Barksdale, 15 A. 465.

Amount of bond when injunction issued by clerk.

See Acts 106 of 1890, 48 of 1882.

(F) Whose favor.

1. Bond must be in favor of defendant.
2. But when erroneously in favor of sheriff principal and surety are still bound.

R. R. Co. vs. Barksdale, 15 A. 465; Biggs vs. D'Aquin, 13 A. 21.

(G) Conditions of bond.

Bond conditioned that plaintiff and surety shall pay such damages as *defendant* may sustain in case it should be decided that injunction was wrongfully obtained.

Carroll vs. Readheimer, 35 A. 374.

(H) When condition of bond not violated:

1. When injunction maintained even in part.
Ralford vs. Thorn, 15 A. 81; Carroll vs. Readheimer, 35 A. 374; Offut vs. Dusen, 35 A. 987.
2. When injunction dissolved for purely technical informalities.
Davis vs. Millaudon, 14 A. 808.
3. When injunction was justified at time of issue, but changed condition of things justified dissolution.

15 A. 81; Carroll vs. Readheimer, 35 A. 374; Slaughterhouse Co. vs. Howell, 37 A. 280; 19 A. 78.

(I) Suit on the bond:

1. When necessary.
 - (a) When no money judgment is enjoined.
Crescent City Live Stock Landing and Slaughterhouse Co. vs. Larrioux, 30 A. 740; Sheen vs. Stothart, 29 A. 630; Willis vs. Elam, 28 A. 859; Scott & Williams vs. Sheriff, 30 A. 530.
 - (b) Such as executory process.
Ricard vs. Harrison, 19 A. 181.
 - (c) Also in cases of sequestration, no law allowing damages on dissolution.
Morgan vs. Driggs, 17 L. 176; Nuzum vs. Gore, 24 A. 208; Knox vs. Thompson, 12 A. 116.
2. No formal assignment of bond necessary and action may be by sheriff or defendants.
R. R. Co. vs. Barksdale, 15 A. 465.
3. Surety bound by allegations of petition, affidavit, etc.
Green vs. Huey, 23 A. 704; R. R. Co. vs. Barksdale, 15 A. 465.
4. Amount of bond may, perhaps, be blank.
Mason vs. Fuller, 12 A. 68.
5. Federal injunction bond may be sued on in State court.
Aiken vs. Leathers, 37 A. 482; Aiken vs. Leathers, 40 A. 23.

action of money judgment:

damages allowed on dissolution.

an execution on specific property is enjoined and injunction dissolved.

Betts vs. Monqui, 15 A. 52.

amount of damages allowed.

Twenty per cent. statutory damages and 10 per cent. interest and without formal proof.

Meaux vs. Pittman, 85 A. 860; *Ralford vs. Wood*, 14 A. 116; *Mills vs. Jones*, 9 A. 11; *Pendleton vs. Eaton & Barstow*, 28 A. 485; *Brown vs. Lambeth*, 2 A. 822.

When debt itself bears 8 per cent. interest only 12 per cent. can be added.

Lallande vs. Ingram, 19 A. 868; *Ralford vs. Wood*, 14 A. 116; *Campbell vs. Oliver*, 15 A. 188.

Damages calculated on amount of judgment enjoined, not on whole judgment when part only enjoined.

Perry vs. Kearney, 14 A. 401; *Pendleton vs. Eaton & Barstow*, 28 A. 485; *Calderwood vs. Trent*, 9 R. 227; *Stewart vs. Robinson*, 24 A. 192.

Special damages when alleged and proved.

Walker vs. Villavaso, 28 A. 799; *Mason vs. Poulaller*, 10 A. 418.

But only actual damages are recoverable in absence of malice.

Riggs & Bro. vs. Bell, 42 A. 666.

Statutory damages will not be allowed where special damages are allowed.

Williams vs. Close, 14 A. 746.

Statutory damages allowed on dissolution of injunction against collection of licenses or taxes; but not where rule nisi issued.

Act 96 of 1877, Sec. 55, p. 147.

whose benefit damages allowed.

On sale of succession property is enjoined, creditors of succession can not ask allowance of statutory damages on basis of their claim. Damages go to succession.

Wells vs. Wells, 25 A. 194.

no damages are allowed.

When writ not palpably misused, as when point raised was unsettled by jurisprudence.

Williamson vs. Richardson, 80 A. 1168.

2. When conditions of bond are not violated and when writ though dissolved, rightfully issued.

See *Carroll vs. Readheimer*, 35 A. 374.

3. When writ is issued by a tutor.

Gregg vs. Eastin, 30 A. 1130.

4. When writ is maintained even in part.

Pointer vs. Roth, 19 A. 78; *Chappins vs. Preston*, 23 A. 729; but see *Michel vs. Meyer*, 27 A. 173, where damages are allowed on proposition of writ dissolved; 15 A. 70.

(M) *Surety is party to suit, only when money judgment is enjoined*

1. Need not be cited on appeal; appeal by motion, or where no judgment was asked against surety.

Tilton vs. Vignes, 33 A. 240; *Matta vs. Gayle*, 10 A. 347; *Lavedan vs. Trinhard*, 35 A. 540.

2. But this rule applies only where injunction is dissolved. When injunction maintained surety must be cited.

Avegno vs. Johnson, 22 A. 400; *Battalora vs. Erath*, 25 A. 318; *Richardson vs. Piseros*, 26 A. 551; *Lane vs. Rosellus*, 23 A. 269.

3. Surety on injunction bond can not be surety on appeal bond.

Bauer vs. Lochte, 30 A. 695; *Bowman vs. Kaufman*, 30 A. 1023; *Dunham vs. Mary*, 29 A. 608.

Aliter as to surety on attachment bond.

French vs. Davidson, 32 A. 713.

4. When other than money judgment is enjoined, surety must be proceeded against on the bond, not on rule to dissolve injunction.

King vs. Labranche, 35 A. 309; *Scott & Williams vs. Sheriff*, 30 A. 1; *Griffin vs. Scott*, 1 R. 143; *Gillaspie vs. Scott*, 32 A. 767.

5. As injunctions:

(a) Restraining collection of license.

King vs. Labranche, 35 A. 305.

(b) Restraining destruction of fences, etc.

Sheen vs. Stothard, 39 A. 630.

(c) Restraining performance of acts injurious to plaintiff.

Crescent City Live Stock Landing and Slaughterhouse Co. vs. Larrieux, 30 A. 741.

(d) Restraining sale of property under order of court.

Boyer vs. Joffrion, 40 A. 658; *Willie vs. Elam*, 23 A. 363.

(e) Restraining putting an adjudicatee in possession of property claimed by third person as owner.

Verges vs. Gonzales, 33 A. 416.

(f) Restraining disposition of property pending suit.

Green vs. Reagan, 32 A. 975.

(g) Restraining order of seizure and sale (executory process).

Meaux vs. Pittman, 85 A. 861; Burgess vs. Gordy, 82 A. 1296; Thompson vs. Lemelle, 82 A. 982; Hodgson vs. Roth, 83 A. 941; Dejean vs. Hebert, 81 A. 729; Cane vs. Hawthorn, 83 A. 964; Gillaspie vs. Scott, 82 A. 767; Church vs. Sheriff, 83 A. 1462; but see Witkowski vs. Selby, 15 A. 528.

(h) Restraining execution of judgment decreeing ownership of property.

Morris vs. Bienvenu, 80 A. 879.

(i) Restraining debtor from settling with prior mortgagee, whose mortgage is attacked as simulated.

D'Meza vs. Generes, 22 A. 286.

Rights of surety as party to suit.**1. He is entitled to notice of judgment by default.**

Verges vs. Gonzales, 88 A. 410.

2. He must be cited on appeal when his interests are affected.

Bethancourt vs. Stephens, 19 A. 291; Gibson vs. Selby, 8 A. 818.

But not otherwise.

Tilton vs. Vignes, 83 A. 240.

3. He is embraced in an appeal on motion.

Mitchell vs. Lay, 4 A. 414; Matta vs. Gayle, 10 A. 847.

4. He must be specifically condemned on dissolution of injunction, else he may enjoin execution against him.

Franz vs. Waggaman, 28 A. 514.

Liabilities of surety as party to suit.**1. He is deprived of plea of discussion, and is liable *in solido*.**

Denton vs. Irwin, 5 A. 21; Perry vs. Kearney, 14 A. 401.

2. He must be condemned on rule as well as on merits.

Betts vs. Monqui, 10 A. 418; Friedman vs. Adler & Levy, 86 A. 884.

3. He is not entitled to special notice of dissolution.

Friedman vs. Adler & Levy, 86 A. 884.

4. He is condemned by judgment against principal alone.

Mason vs. Poulaller, 10 A. 418.

5. He may be sued with principal.

Parham vs. Cobb, 7 A. 157; Block vs. Meyers, 85 A. 220.

Damages allowed in suit on injunction bond.**1. Only specially alleged and specially proved damages are allowed. Ten per cent. interest and twenty per cent. special damages not recoverable where injunction was against writ of seizure and sale.**

Meaux vs. Pittman, 85 A. 861; Williams vs. Close, 14 A. 746.

2. Elements of damages:

(a) Counsel fees for dissolving injunction.

Williams vs. Close, 14 A. 746; Aiken vs. Leathers, 37 A. 482; White vs. Givens, 29 A. 571.

Though not actually paid.

Meaux vs. Pittman, 35 A. 862; McRae vs. Brown, 12 A. 181; Brown vs. Lambeth, 2 A. 822; Hereford vs. Babin, 14 A. 333.

(b) But counsel fees not connected with services for dissolving are not recoverable.

Campbell vs. Short, 35 A. 466; Anderson vs. Duson, 35 A. 918; Aiken vs. Leathers, 40 A. 23.

(c) Damages resulting from main suit, not from injunction process, are not allowed.

Lemonnier vs. McCarley, 41 A. 411; 37 A. 132; 34 A. 844.

(Q) Damages recoverable though no bond given.

Aiken vs. Leathers, 40 A. 26; Florance vs. Nixon, 3 L. 291.

(R) Dissolution *prima facie* evidence of injury or damage.

Conery vs. Coons, 33 A. 374; Florance vs. Nixon, 3 L. 292; Canal and Navigation Co. vs. Touche & Hollander, 38 A. 389; Barrimore vs. McFeely, 32 A. 1179; Lemonnier vs. McCarley, 41 A. 411.

(S) Damages for violation of injunction.

Plaintiff may recover all damages sustained thereby.

Levy vs. Waterworks Co., 38 A. 29.

305. Service of Injunction—The clerk of the court which granted the injunction shall deliver as many copies of the petition and of the injunction as there are parties against whom the same is directed, and the mode of service shall be the same as in ordinary suits.

Want of citation not waived:

By appearance to except to same or by answer under reservation of benefit of exception.

Harkness vs. Hyde, 98 U. S. 476; see also 10 A. 334, 29 A. 362.

306. Service of Writ on Notaries, where Injunction is Against Disposal of Property—When an injunction has been obtained to prevent one from disposing of a thing in dispute, or a husband from selling the property belonging to the community, or his own property subject to the

lege of his wife, such injunction must be served, not on the defendant, but also on public notaries or public officers performing notarial functions, if the plaintiff require it.

D. C. 149.

7. Dissolution of Injunction by Bonding—Whenever an act prohibited by the injunction is not such as may work irreparable injury to the plaintiff, the court may in its discretion dissolve the same; provided the defendant execute his obligation in favor of the plaintiff, with the surety of one good and solvent person residing within the jurisdiction of the court, for such sum as the court may determine, according to the nature of the case, as security that he will deliver the property in dispute in the same manner in which it was at the moment of issuing the injunction; and that he will pay besides to the plaintiff all damages he may have sustained by this act, if a definitive judgment be rendered against him in the suit pending.

D. P. 804, 474, 568.

Dissolution of injunction:

1. Dissolution on motion—causes.

(a) **Insufficient security.**

Betts vs. Monqui, 15 A. 52.

(b) **Falsity of allegations of petition; but motion must in this case be referred to merits.**

Williams vs. Douglas, 21 A. 468.

(c) **That no affidavit was really taken—though officer so certify.**

Barrow vs. Richardson, 28 A. 208.

2. Service of rule. Proper service necessary.

Marin vs. Thiery, 29 A. 362.

3. Motion to dissolve will not prevail:

(a) **Where another injunction would at once issue.**

Dupré vs. Swafford, 25 A. 222; *Ward vs. Douglas*, 22 A. 463.

(b) **In such cases on appeal, the cause is remanded.**

Citizens Bank vs. Crooks & Maristany, 21 A. 524; *Lewis & Gist vs. Daniels*, 28 A. 171.

- (c) Where grounds are not sufficient. No causes for dissolution not alleged can be proved.

Stockett vs. Johnson, 22 A. 89; 3 L. 220; 2 A. 498.

4. Summary trial of motion.

Richardson vs. Dinkgrave, 26 A. 681; Williamson vs. Richardson, A. 1164; Gillaspie vs. Scott, 32 A. 769.

5. No jury allowed:

Dabbs vs. Hempken, 8 R. 124.

6. Ordinarily allegations of petition taken for true.

Waterworks Co. vs. Oser, 36 A. 918; Rawlings vs. Bowie, 33 A. 571; Ferriere vs. Schreiber, 16 A. 7; Jenkins vs. Fulton, 9 R. 200.

Aliter where motion based on denial of the facts.

Richardson vs. Dinkgrave, 26 A. 681; State vs. Booth, 28 A. 728.

7. When motion may be made:

(a) Motion may be filed after issue joined.

Butman vs. Forshay, 21 A. 165.

(b) *Aliter* as to attachment.

Perry vs. Meyers, 1 A. 572.

8. Partial dissolution and partial perpetuation.

Offut vs. Duxon, 35 A. 987; Harang vs. Blanc, 34 A. 637; Peary vs. Kearney, 14 A. 401; Osborn vs. Osborn, 23 A. 498.

(B) *Amendment of petition after motion to dissolve:*

1. No amendment is permitted to cure radical defects.

Rhodes vs. Union Bank, 7 R. 63; Judson vs. Connolly, 5 A. 466.

2. Nor in any event where not sworn to.

Calderwood vs. Trent, 9 R. 227.

(C) *Appeal from judgment of dissolution:*

Appeal from order dissolving allowed and when suspensive injunction continues in force.

State ex rel. Behan vs. Judge, 32 A. 1277; State of Louisiana vs. Judge, 19 L. 172; City Bank vs. Walden, 2 R. 181.

But no appeal lies where dissolution on bond works no irreparable injury.

Jure vs. Municipality, 2 A. 321; Cobb vs. Parham, 4 A. 147; State vs. son vs. Municipality, 12 R. 488; 7 N. S. 54, 457.

(D) *Test of appealable amount:*

In seizures the test is value of property where injunction is by third person claiming ownership; but the amount of the judgment controls when defendant enjoins.

Gayarre vs. Hays, 21 A. 307.

Dissolution on bond:**1. Is a matter of discretion, not enforceable by mandamus.**

Both vs. Judge, 88 A. 49; *State ex rel. Lottery Co. vs. Judge*, 28 A. 786; *Slaughterhouse Co. vs. Police Jury*, 52 A. 1192; *Slaughterhouse Co. vs. Butchers' Union*, 83 A. 981; *Cumminge vs. Judge*, 29 A. 880; *Yale et al. vs. Judge*, 41 A. 518; *R. R. Co. vs. Judge*, 86 A. 835.

2. When allowed:**(a) When administrator is enjoined from discharging his duties.**

Anderson vs. Smith, 28 A. 649.

But not in all cases.

See *Brown vs. Brown*, 80 A. 506.

(b) When city is enjoined from keeping open a drainage canal.

R. R. Co. vs. City, 80 A. 970.

(c) When telephone company is enjoined from erecting poles in front of plaintiff's residence.

Irwin vs. Telephone Co. 86 A. 772.

(d) Where damages are claimed and bond covers same.

Osgood vs. Black, 88 A. 498; *Levine vs. Michel*, 84 A. 1182.

(e) When injunction is so vague and indefinite that its extent is uncertain.

Avery vs. Onillon, 10 A. 127; *McRae vs. Brown*, 12 A. 181.

(f) When injury is reparable by money compensation.

Slaughterhouse Co. vs. Police Jury, 52 A. 1192; *Lattier vs. Abney*, 48 A. 1017; *Levine vs. Michel*, 84 A. 1181; 83 A. 493; *State ex rel. Sigur vs. Judge*, 87 A. 111.

3. When not allowed. When injury would be irreparable,
as—**(a) When bonding would change possession of real estate.**
Sigur vs. Judge, 83 A. 183; *Marion vs. Johnson*, 22 A. 512; *Torres vs. Falgoust*, 88 A. 560.**(b) When party would be driven to another suit to vindicate his rights.**

Puckette vs. Hicks, 39 A. 901; *White vs. Casanave*, 14 A. 57; *Bodloker vs. East*, 24 A. 154; *State vs. Judge*, 12 A. 456; *State ex rel. R. R. Co. vs. Judge*, 28 A. 51.

(c) Where order of seizure and sale is enjoined.

Insurance Co. vs. Benit, 29 A. 297.

(d) When city enjoins license debtor from carrying on his business.

City vs. Becker, 81 A. 645.

(e) When defendant carries on a business which endangers health and comfort.

State ex rel. Violet vs. Judge, 46 A. 78; Blanc vs. Murray, 36 A. 167; State ex rel. Druliet vs. Judge, 29 A. 870.

(F) Rule to dissolve on bond:

1. Enjoining plaintiff must have notice.

Baldwin vs. Bellocq, 35 A. 982; Marin vs. Thiery, 29 A. 352; Pike vs. Bates, 34 A. 391.

2. Merits not trenching upon.

Waterworks Co. vs. Oser, 36 A. 918.

(G) Amount of bond:

Should be ample to cover all possible injuries.

Brown vs. Brown, 30 A. 506; Baldwin vs. Bellocq, 35 A. 983.

(H) Exemption from giving bond:

1. City of New Orleans exempt.

R. R. Co. vs. City, 30 A. 970.

But city officers must furnish bond.

Hoey & O'Connor vs. Brown, 29 A. 53; George vs. Mount, 21 A. 177.

2. State exempt, but a levee board have no authority to act for the State.

Gastel vs. McGenty, 20 A. 431.

(I) Appeal from order dissolving on bond:

1. Appeal allowed when, from allegations of petition, injury is irreparable.

Delacroix vs. Villere, 11 A. 39; White vs. Casanave, 14 A. 57; Lottery Co. vs. Judge, 23 A. 766; Simon vs. Walker, 26 A. 604; Insurance Co. vs. Benit, 29 A. 297; Levine vs. Michel, 34 A. 1181; 30 A. 970; Puckette vs. Hicks, 39 A. 901; Torres vs. Falgoust, 33 A. 560; State ex rel. Signar vs. Judge, 33 A. 133; Marion vs. Johnson, 22 A. 512; Waterworks Co. vs. Oser, 36 A. 918.

2. And mandamus lies to enforce right to appeal.

Gravois vs. Judge, 33 A. 760.

3. And prohibition to prevent lower court from in any manner violating original injunction.

Id.

(J) No appeal:

When injury not irreparable and sufficient bond given.

Osgood vs. Black, 33 A. 493; Gravois vs. Judge, 33 A. 760; Poydras vs. Tusson, 3 L. 443.

Judgment refusing to bond:

Is appealable.

Doullert vs. Judge, 29 A. 871.

Trial on the merits pending appeal from order dissolving:

Appeal from order dissolving does not stay or prevent trial on the merits.

State ex rel. Butchers' Union vs. Judge, 33 A. 436.

Liability of surety on release bond.

He is bound for whole judgment recovered against defendant bonding.

George vs. Taylor, 80 A. 770.

Who may bond:

Plaintiff and third opponent may bond seizure in ten days after filing petition.

Act 109 of 1890, p. 137.

Effect of bonding.

It authorizes performance of act enjoined.

State ex rel. Yale & Co. vs. Judge, 41 A. 516; *State ex rel. Bell vs. Judge*, 36 A. 896.

38. Violation of Injunction—Penalty—If one against whom the injunction is directed violate the same or refuse to obey, the court may either cause to be destroyed whatever may have been done in contravention of the injunction, if it be practicable, or they may punish him by an imprisonment not exceeding ten days, but which may be repeatedly inflicted, until the party obeys the mandate of the court. The party aggrieved by the disobedience of any person, may also recover from him such damages as may show that he has sustained from such disobedience.

Violation of absolutely void injunction:

Violation of such injunction entails no penalties.

State ex. rel. Liversey vs. Judge, 34 A. 741; *Barthe vs. Largie*, 42 A. 134.

(B) Violation of injunction not absolutely void—how punished:

1. By imprisonment under C. P. 308, and by fine under C. P. 181 as for contempt.

State ex rel. Waterworks Co. vs. Levy, 36 A. 944.

2. And a suspensive appeal from an order dissolving an injunction continues it in force, and violations thereof are punished accordingly.

State ex rel. Barthet vs. Judge, 57 A. 852; *Butchers' Union vs. Judge*, 33 A. 488, 494, 560; *Gravols vs. Judge*, 33 A. 760.

3. And lower court may proceed, notwithstanding suspensive appeal.

Id.

4. But ordinarily suspensive appeal from order dissolving strips lower court of jurisdiction.

Irwin vs. Judge, 36 A. 192.

(C) Only party enjoined can violate injunction.

When writ not issued or directed against a person, he can not be held for violation.

Barthe vs. Largue, 42 A. 181.

(D) Governor may pardon violation.

Governor may pardon person imprisoned for contempt.

State ex rel. Van Orden vs. Sheriff, 24 A. 119.

309. Return of Bond into Court—The sheriff, whenever he receives an act of suretyship in any of the cases mentioned above, must immediately send the same to the clerk of the court which gave the mandate, in order that the plaintiff may have an opportunity of objecting to the insufficiency of the security, in the manner provided as relates to the surety given for the appearance of debtors.

SECTION V.

Of Judgment by Default.

310. Default—If the defendant do not appear either in person or by his advocate after the delay provided by law, the plaintiff may take a judgment by default against him.

C. P. 318, 606.

*default allowed:***Pending exceptions.**

Francis vs. Steamer Black Hawk, 18 A. 629; *Rawle vs. Skipwith*, 8 N. S. 119; *Ballard vs. Lee's Administrator*, 14 L.; *State vs. Vallete*, 26 A. 780.

On an unsworn supplemental petition praying injunction.

Richardson vs. Dinkgrave, 26 A. 651.

Pending an intervention not yet at issue.

Perkins vs. Perkins, 20 A. 267; 8 A. 831; 16 L. 268; *Lane vs. Clark*, 27 A. 201.

Consent judgment:

L. 448.

No citation or default necessary.

Thornhill vs. Bauck, 84 A. 1171; *Marbury vs. Crossley*, 29 A. 557.

Consent judgment not be in writing; if given in open court sufficient.

Id.; *Woodward vs. Lenty*, 11 A. 280.

Eliminatory default being prematurely taken, judgment invalid though confirmation is delayed.

Art & Co. vs. Nixon & Co., 25 A. 136; *Fowler vs. Smith*, 1 R. 448; *Arthur vs. Oochran*, 12 R. 48; *Williams vs. Dunn*, 2 A. 806; *Ward & Jonas vs. Graves*, 1 A. 116; *Dugal vs. Markham*, 1 L. 219.

When full days must elapse:**As soon as they elapse, default taken.**

Succession of Cordevolle, 23 A. 297; *Maurin vs. Dashiell*, 7 L. 664; *Carmena vs. Mix*, 8 L. 107; 15 L. 166.

And where tenth day is *dies non*, whole of next day allowed.

Fowler vs. Smith, 1 R. 448; *Garland vs. Holmes*, 12 R. 421; *Mercier vs. Judge*, 29 A. 228; *Catherwood vs. Shepard*, 80 A. 677.

Default on supplemental petition:**When necessary:**

When matters of substance are alleged.

St. Amand vs. Long, 25 A. 164.

What proceedings default need be taken:

Proceedings by heirs to be recognized contradictorily with executor, administrator or curator of estate.

Caldwell vs. Glenn, 6 R. 9.

(G) *Judgment by default is abandonment of right to proceed via executiva.*

Patterson vs. Mayfield, 5 L. 512; Id. vs. Id., 10 L. 221.

(H) *Citation essential:*

When wanting, judgment annulled; and in cases of foreign judgment, citation or equivalent must be shown.

Patterson vs. Mayfield's Curator, 10 L. 221; 2 N. S. 599; 1 R. 575; 11 R. 326; 4 A. 574; 5 A. 43; Adams & Co. vs. Basile, 35 A. 101; Board of Administrators praying, etc., 34 A. 97.

311. Entry of Default—Such judgment may be obtained by moving for it in court, but it consists merely in a statement on the records of the court, showing that the defendant has failed to appear.

C. P. 534.

Entry on minutes that default taken is essential.

Adler, Goldman & Selgel vs. Wolff, 36 A. 175.

But default not essential before justices of the peace.

State ex rel. Sidoth vs. Judge, 45 A.

312. Confirmation of Default—If, two days after this first judgment has been rendered, the defendant neither appear nor file his answer, definite judgment will then be given for the plaintiff, provided he prove his demand. This proof is required in all cases.

R. S. 545; C. C. 2232.

(A) *Preliminary default essential to a valid confirmation.*

Washington vs. Hackett, 19 A. 146; Braunsdorff vs. Fay & Marson, 19 A. 187; 7 N. S. 287; Riffin & Co. vs. Bank, 19 A. 373; Huntington vs. Bank, 18 A. 350; Taylor vs. Littell, 21 A. 665; Brown vs. Brown, 21 A. 461; Heirs of Baillio vs. Prudhomme, 8 N. S. 338; Caldwell vs. Fabs, 2 L. 130; Allain vs. Preston, 2 L. 392, 4 L. 13; Knight vs. Knight, 12 A. 60.

(B) *Judgment may be confirmed on third judicial day after default.*

Taney vs. Meilleur, 35 A. 119; Hart vs. Nixon, 24 A. 137; DeBlanc vs. LeBlanc, 15 A. 224; Hull vs. Mulholland, 3 L. 113.

(C) *Waiver of citation.*

Waiver authorizes judgment at any time.

Evans vs. Payne & Harrison, 30 A. 498.

(D) *Essential allegations must be proved:*

35 A. 529.

s plaintiff must prove:

Capacities of alleged legal representatives to stand in judgment.

Beall vs. Succession of Elder, 84 A. 1098; Mechanics Bank vs. Walton, 7 R. 451; Proctor vs. Richardson, 6 L. 120.

Endorsement of note to him.

Blum, Stern & Co. vs. Sallis, 24 A. 118; Gubernator vs. New Orleans, 20 A. 106; Young vs. Talbot, 12 R. 518; Pike vs. State, 20 A. 547; Brown vs. Thomas, 9 A. 95.

Valid citation and return thereon.

Adams & Co. vs. Basile, 85 A. 101.

Authorization of husband.

11 A. 265; Schewer vs. Klein, 15 A. 808; Lacour vs. Delamarre, 2 A. 140.

Separation in property of wife, or enuring of debt to her separate benefit.

White vs. Baillo, 12 A. 663.

Correctness of account sued on.

Harrison vs. McCawley, 10 A. 270.

Lawful and proper execution of depositions.

Underwood vs. Lacapere, 10 A. 766.

But not signature of defendant to note.

Young vs. Talbot, 12 R. 518; Bryan vs. Spruell, 16 L. 814; Griffing vs. Caldwell, 1 R. 16; but see Davis vs. Davis, 8 A. 91.

Verity of plaintiff's claim, particularly against co-defendant of his debtor.

Fink vs. Martin, 1 A. 117.

Debt over \$500 by two witnesses or one and corroborating circumstances.

Hagan vs. Ferres, 8 L. 633.

Title of plaintiff and slander thereof.

Proctor vs. Richardson, 11 L. 188.

judgment on claim on open account confirmed on affidavit:

Act 31 of 1890, Article C. P. 312 is re-enacted and the following is added: "This proof is required in all cases, and when the demand is for the sum due on an open account, when an affidavit of the correctness thereof, before any competent officer, shall be *prima facie* proof."

tual proof necessary:

It need not be reduced to writing.

Jones vs. Neville, 9 R. 478; Abbott vs. Bell, 6 L. 453; 84 A. 681; 89 A. 226; 81 A. 856.

*(G) Two judicial days are allowed:*Formerly *three* judicial days.

Fowler vs. Smith, 1 R. 448; Johns & Co. vs. Boyle, 14 L. 208; Howard vs. Havard, 3 L. 118.

(H) No calling on docket necessary for valid confirmation.

Small vs. Flint, 4 L. 223.

(I) Non-suit:

1. When case not legally proved, non-suit entered.

Kimball vs. Dreher, 1 L. 79; Wilson vs. McHugh, 1 L. 140; Hall vs. Marshall, 3 L. 342; Duffy vs. Byrne, 5 L. 134; Morrison vs. French, 4 L. 444; Culliver vs. Garie, 6 L. 58, 490.

2. So also where plaintiff does not appear, provided defendant have filed no reconventional demand; if so, he may force trial of case.

Moch vs. Garthwaite, 11 A. 287; Verges vs. Gonzales, 33 A. 415; Ludwig vs. Kohlman, 5 A. 298; Osborn vs. Bank of Miss., 2 A. 494; Fonda vs. Denton, 13 A. 343; Florance vs. Wilcox, 14 L. 58.

(J) Remedy by appeal:

When judgment by default becomes final, remedy is by appeal. Case will not be reopened.

Borce vs. Kellar, 7 L. 501.

(K) Confirmation of default after answer filed illegal.

French vs. Putnam, 14 L. 97.

313. **Jury to Assess Damages**—When, from the nature of the demand, damages are to be assessed, the court will direct a jury to be summoned to find the same, in the same manner as if the defendant had answered; and the court will give their judgment in conformity with the verdict of the jury.

(A) A jury should be empaneled to try:

1. An action for damages caused by defamation.

Schiver vs. Klein, 15 A. 303.

2. Claim for damages in possessory action.

Guillotte vs. Thompson, 5 R. 141.

3. Claim for damages for taking and detaining horse and dray.

Olivier vs. Cannon, 18 L. 475.

4. An action to recover a note, with claim of damages for its detention.

Liter vs. Canal Bank, 6 R. 273.

B) A jury need not be summoned to try:

- An action for breach of contract where damages are ascertainable with certainty.

Brander, Williams & Co. vs. Goodin, 6 A. 521.

C) Remedy where jury has not been called:

- Remedy is by appeal only; not by action of nullity.

Blanck vs. Speckman, 23 A. 146.

D) Article 313 C. P. applies only in cases of default; in all other cases court may assess damages.

Daly vs. Van Benthuyssen, 8 A. 69.

314. Setting Aside Default—If the defendant, on the very day when a definitive judgment by default was to have been rendered against him, appear and file his answer, the first judgment taken shall be set aside.

A) Effect of answer on prior default:

1. Answer sets aside default.

Borland vs. Judge, 30 A. 155; *Magee vs. Dunbar*, 10 L. 547.

2. But no exception has such effect, not even peremptory exception, when filed and considered purely as such.

Borland vs. Judge, 30 A. 155; *Bank vs. Beard*, 5 A. 41.

3. Nor an agreement to submit to arbitrators.

Fielding vs. Westermeyer, 20 A. 51.

4. And where peremptory exception not treated as an answer, case remanded for trial on merits.

Lea vs. Terry, 15 A. 159.

5. Asking that default be set aside is an admission that a judgment by default was rendered.

Hempken vs. Farmer, 8 R. 155.

B) When answer may be filed:

1. Answer may be filed on day of confirmation, if it cause no delay.

Moran & White vs. Fanner, 6 A. 119.

2. But defendant will not be entitled to delay, except on clearest showing.

Winchester vs. Rightor, 12 L. 256.

3. Answer allowed on first day of term of court.

Bryan vs. Spruell, 16 L. 814.

(U) *Alleged exception treated as answer:*

Court may direct peremptory exception to be treated as answer.

Lea vs. Terry, 20 A. 480.

(D) *Rule to set aside default.*

Such a proceeding is irregular, but amounts to an appearance.

City vs. Hall, 21 A. 489.

(E) *Default cuts off all exceptions which should be filed in limine; e g., such exceptions as—*

1. Exception to capacity of plaintiff to sue.

Reynolds vs. Reynolds, 12 L. 618.

2. All exceptions purely dilatory.

Welsh vs. Shields, 6 R. 486; Young vs. Patterson, 11 R. 7.

315. Grounds of Judgment Must Be Stated—A judgment by default must express the ground on which it was rendered, but it is sufficient to state in the final judgment that the demand was proved.

Constitution 1868, Art. 80; Constitution 1879, Art. 87.

(A) *Notice of judgment by default:*

1. Must be given when service has not been made personally

Taylor vs. Woodward, 25 A. 212; 21 A. 464; Acts 1876, p. 42.

2. And of *ex parte* orders, such as judgment putting heirs in possession.

State ex rel. Zimmerman vs. Judge, 84 A. 655; Board of Administrators, etc., 84 A. 96; Taylor vs. Woodward, 25 A. 212.

3. Notice need not bear judge's signature.

25 A. 392.

(B) *Want of notice cured by prescription of five years.*

Holt vs. Board of Liquidators, 88 A. 675; Frazer vs. Zyllicz, 29 A. 534.

(C) *Judgment:*

Must be signed in open court, not in chambers.

Laurent vs. Beelman, 80 A. 863.

But see as to whether signature is required at all.

Babin vs. Winchester, 4 L. 289.

-) *Reasons for judgment must be given.*
 See judgment—post.
 It seems such was not necessary in 1816 under then existing law.
 Babin vs. Winchester, 4 L. 289.
-) *Record must show proving of case.*
 Tillett vs. Upton, 12 A. 146.
-) *Only parties to suit are entitled to notice of judgment.*
 Executor need not be notified of judgment putting heirs in possession.
 State ex rel. Zimmerman vs. Judge, 84 A. 658.

SECTION VI.

Of the Appearance and Answer of the Defendant.

316. **Prayer for Extension of Time to Answer**—When the defendant appears, he may pray for further time to answer, and the court may grant a further delay, if necessary for the purposes of justice.

85 A. 529.

-) *No extension granted when not timely asked for.*
 McPherson vs. Robinson, 4 L. 564.
-) *What amounts to an appearance:*
 Moving to remove cause to Federal court.
 Stokes vs. Leavenworth, 7 L. 891.
-) *What does not amount to appearance:*
 Motion to dissolve attachment.
 Billin vs. White, 15 A. 624; Bonner & Smith vs. Brown, 10 A. 134; Davis vs. Taylor, 4 N. S. 184.
-) *Answer cuts off such exceptions as should be pleaded in limine; as—*
1. **Capacity of plaintiff to sue.**
 Cochrane vs. Miller, 10 A. 140; Reynolds vs. Reynolds, 12 L. 618; Taylor vs. Littell, 21 A. 665.
 But not his absolute right to sue, which may be denied at any time—e. g.:
 Want of interest.
 Cure vs. Porte, 18 A. 453; Pipes vs. Norsworthy, 25 A. 557; Thibodaux vs. Comeau, 80 A. 1119.

2. Prematurity of action.

Noble vs. Martin, 7 N. S. 234.

317. Answer Filed on First Day of Term—It shall be sufficient in all cases, except in the first judicial district, for a defendant to file his answer on the first day of the term.

C. P. 16.

(A) *This applies to answer, not to filing transcript of appeal.*

Laerolx vs. Bonin, 33 A. 119.

(B) *Defendant must answer in capacity cited; personal answer by one sued officially does not join issue.*

Jefferson vs. Kaiser, 17 A. 176.

(C) *Day of service of citation is excluded from computation of ten days for answer.*

Taney vs. Meilleur, 35 A. 118.

318. Computation of Delay for Answering Sunday Included—In the delay given to the defendant for answering, Sunday is included like other days; but in all cases where delay is given either to do something or to answer, neither the day of serving the notice, nor that on which the act is to be done or the answer filed, are included.

The exceptions to this rule are specially provided by law.

R. S. 324, 520; C. C. 2057, 2058, 2059; C. P. 180, 207, 310, *et seq.*

(A) *Computation of delays:*

Neither the day of notice nor that on which act is to be done are included.

Garland vs. Holmes, 12 R. 421; Mercer vs. Judge, 29 A. 224; Tapery vs. Edmondson, 29 A. 850; State ex rel. Duffel vs. Marks, 30 A. 97; Catherwood vs. Shepard, 30 A. 677; Fowler vs. Smith, 1 R. 448.

(B) *Rule in C. P. 318 does not apply in computing:*

Delay of ten days provided in settlements between tutor and minor.

Hodgson vs. Roth, 33 A. 945.

319. Answer—Form—The answer must express the name, surname, and residence of the defendant, as well

the name of the plaintiff; and it must be free from all abusive, defamatory, or impertinent expressions.

The answer must conclude by praying that the demand of the plaintiff be rejected, and that he be sentenced to pay the costs of the suit; unless the defendant himself should intentionally plead compensation or some other exception.

Terms of answer:

The answer may neither admit nor deny any averments. Such an answer puts whole case at issue.

Bayhl vs. Bayhl, 35 A. 529.

Answer by married woman:

She must be authorized.

White vs. Bird, 20 A. 281; Champlin vs. Lee, 19 A. 148; Adie vs. Anty, 1 A. 260; Saunders vs. Burns, 38 A. 367.

30. Refusal to Answer—Exceptions—Want of Authority—

The defendant may refuse to answer to the merits, if he has good ground for such refusal, as if the refusal is brought by one pretending to act as the attorney in fact of the plaintiff, and he fail to annex to the petition a copy of his power of attorney, or by a minor without being assisted by his tutor, or by a married woman without the authorization of her husband or of the court.

C. P. 175.

Authorization of husband.

May be shown at any time before trial of exception.

Salvant vs. Salvant, 20 A. 817; Howard vs. Copley, 10 A. 504.

31. Answer not Required after Exception till Documents Produced or Authority Given—

In all the cases mentioned in the preceding articles, and in all other cases of the like nature, if the defendant take any such exception, and the same be sustained by the court, he shall nevertheless be required to answer to the merits, until the documents which he calls for be produced, or until the plaintiff be assisted in such a manner as to enable them to proceed fully and fairly.

C. P. 175.

(A) *Bills of particulars should be furnished on exception before defendant required to answer.*

Hyland vs. Bloe, 20 A. 65; Ledoux, vs. Goza, 2 A. 396.

(B) *No answer compelled until prayer for oyer complied with.*

Fletcher vs. Cavellier, 4 L. 267.

322. Exception to Jurisdiction—The defendant need not plead to the merits, if he decline the jurisdiction of the court before which the suit is brought.

323. General Denial—Denial of Signature—When the defendant answers to the merits, he is not bound to answer specially to all the allegations contained in the petition; it is sufficient to deny, generally, all the facts stated, except he be called upon either to acknowledge or to deny his signature.

C. P. 326, 367.

(A) *General denial and special pleas not inconsistent permitted:*

Thus defendant may couple plea of general denial with special plea of—

1. Usury, fraud and want of consideration.

Dumford vs. Ayme, 3 N. 8. 270.

2. Prescription and discharge in insolvency.

Shewell vs. Bageret, 17 L. 460; Ingram vs. Croft, 7 L. 85.

3. Liability merely as agent.

Bloodgood vs. Hawthorne, 9 L. 127.

4. Liability merely as partner, but onus on defendant.

Baker vs. Stewart, 9 L. 159.

5. Novation.

Durham vs. Williams, 33 A. 964; but see 33 A. 999.

6. Payment of part of debt, with denial of balance.

Robinson vs. Landrum, 10 A. 539.

(B) *Want of consideration can not be set up in amendment after general denial.*

Babcock vs. Shirley, 11 L. 76; Calvert vs. Tunstall, 2 L. 208.

(C) *General denial puts plaintiff to proof of:*

1. All conditions precedent to recovery.

Abert vs. Bayon, 3 N. S. 645.

His right to sue as agent.

Lanata vs. Macera, 20 A. 426.

But not his capacity arising from law as syndic, etc.

McDonald vs. Millaudon, 5 L. 405; Houston vs. Childers, 24 A. 472.

Debt due by defendant and not by him and partner.

Noble vs. Martin, 7 N. S. 284.

Notice of protest.

Peyroux vs. Dubertrand, 11 L. 88.

Signature of defendant as acceptor, and of signature of payee.

Fryer vs. Darcy, 17 L. 528.

General denial admits:

Capacity of plaintiff.

Psychoaud vs. Lane, 24 A. 404; Silbernagel & Co., vs. Fluker, 21 A. 186; Houston vs. Childers, 24 A. 473; DeJona vs. Steamboat, 17 A. 277; Tutthill vs. Emerson, 7 L. 598; Moorhead vs. Thompson, 1 L. 282.

Capacity of defendant.

Cheevers vs. Burke's Administratrix, 19 L. 429.

Signature of maker to note.

See C. P. 324; Hyde vs. Brown, 5 L. 84; Miller vs. Cohen, 1 L. 487; Union Bank vs. Succession of Lee, 33 A. 301; Maxwell vs. Kennedy, 10 A. 798; Beach vs. Wagner, 19 L. 87; Vairin vs. Palmer, 14 L. 361; Miller vs. Whitfield, 16 A. 10; Tesson vs. Gusman, 27 A. 267.

But not that of payee and endorser.

Florance vs. McFarland, 15 L. 281; squarely *contra*, see Miller vs. Whitfield, 16 A. 10.

General exceptions amounting to plea of general denial:

That plaintiffs do not compose firm.

Magee vs. Dunbar, 10 L. 550.

That plaintiff is not *bona fide* holder of note sued on.

Burns vs. Haynes, 18 L. 18; Kuestl vs. Griffe, 8 L. 307.

Verdict of exceptions.

Verdict on merits without insisting on trial of exceptions waives exceptions when such are purely dilatory or declinatory.

Phoebe vs. Vienne, 11 A. 683.

Insistent Pleas:

General issue and justification of alleged slander.

Skillman vs. Downs, 10 L. 106.

General denial and payment; latter prevails.

Jones vs. Bishop, 12 L. 397; Bayhi vs. Bayhi, 35 A. 529; Ins. Co. vs. Blanks, 35 A. 1176.

3. Claim for cotton as owner and as holder of lien and privilege.

Cohen vs. Haynes & Rogers, 41 A. 545; Nugent & Co. vs. Buisson, 35 A. 108.

4. Attacking sale as null and claiming proceeds.

Massie vs. Brady, 41 A. 553.

(H) *Pleas not inconsistent:*

1. Want of consideration and payment.

Myles vs. Miller, 4 N. S. 492.

2. Denial of further indebtedness than amount paid.

Robinson vs. Landrum, 10 A. 539.

(I) *Severance:*

1. Co-trespassers may sever.

Arrowsmith vs. Mayor, 17 L. 419.

2. Co-defendants sued, one in tort, other in contract.

Id.; Sere vs. Armitage, 9 M. 394.

(J) *Answer admits what is alleged in petition and not denied.*

Van Hoffman vs. City of Quincy, 4 Wall. 548; Hiestand vs. New Orleans, 14 A. 138; Blanque vs. Woods, 11 A. 103.

Aliter where allegations are mere legal deductions.

Durham vs. Williams, 32 A. 965; State ex rel. Fisk vs. Police Jury, 34 A. 47.

324. Acknowledgment or Denial of Signature—When the demand is founded on an allegation, or an act under private signature, which is alleged to have been signed by the defendant, such defendant shall be bound in his answer to acknowledge expressly or to deny his signature.

C. C. 224; C. P. 175.

(A) *Signature not denied is admitted.*

Miller vs. Cohen, 1 L. 487; Hughes vs. Harrison, 8 N. S. 297; Bennett vs. Allison, 2 L. 419; Bank vs. Lee, 33 A. 301, and cases cited; Maxwell vs. Kennedy, 10 A. 798; Tyler vs. Marcellin, 8 A. 312.

(B) *And where signature not specially denied is proved, defendant is not cut off from other defences.*

Bennett vs. Allison, 2 L. 419; Hyde vs. Brown, 5 L. 33; Valrin vs. Palmer, 14 L. 361; Beach vs. Wagner, 19 L. 87.

(C) *Signature of absent defendant represented by curator ad hoc must be proved though not specially denied.*

Ticknor vs. Calhoun, 29 A. 277.

Denial and Proof of Signature—If the defendant signature in his answer, or contend that the same counterfeited, the plaintiff must prove the genuineness of such signature, either by witnesses who have seen the defendant sign the act, or who declare that they believe it to be his signature, because they have frequently seen him write and sign his name.

The proof by witnesses shall not exclude the proof by comparison of the writing, as established by the Civil Code.

Art. 16; C. C. 2245.

by experts and by comparison of handwriting:

Each proof must be considered.

Succession of Gaines, 88 A. 128; Plique vs. Labranche, 9 L. 559; Sophie vs. Duplessis, 2 A. 724; Aubert vs. Aubert, 6 A. 104; Pence vs. New Orleans, 18 A. 86; Fox's case, 18 A. 448; Olinde vs. Salzan, 10 A. 153; Sauve vs. Dawson, 2 M. 218; Whitney vs. Bunnell, 8 A. 429; Temple vs. Smith, 7 A. 568; Administrator vs. Ball, 15 L. 179; Bank vs. Foucher, 9 L. 410; Davis vs. Police Jury, 19 L. 541.

A signature in evidence for other purposes may be compared with disputed one.

Moore vs. United States, 91 U. S. 270.

by evidence controls that of experts.

Moore vs. Arnet, 15 L. 268.

in criminal cases:

A signature in evidence connected with disputed signature may be used for comparison with disputed signature, but no other signatures can be given in evidence for that purpose.

State vs. Fritz, 28 A. 55.

by witnesses:

A man may testify to handwriting of a will.

Succession of Roth, 31 A. 315.

§ 325 applies to denial of signature when affixed to document on basis of action, but coming in collaterally, as evidence.

State vs. Smith, 7 A. 566.

by value of evidence of signature:

Proof from comparison and long experience stronger than proof of witnesses who have seen a person sign often but not in particular act in dispute.

Succession of Roth, 31 A. 317.

(G) Modes of proving signature not exclusive:

C. P. 825 strictly construed and not extended. Mode of proof provided do not exclude others.

Legond vs. Roach, 4 A. 54.

(H) What is not sufficient evidence:

Where defendant alleges that his signature was forged and his admission that the signature was genuine is not sufficient.

Piloque vs. Labranche, 9 L. 559.

(I) Affidavit denying signature not used on merits.

City Bank vs. Foucher, 9 L. 406.

(J) Court need not appoint experts unless required to do.

All ways of proving signature need not be resorted to.

Bank vs. Foucher, 9 L. 406.

(K) Denial of signature under oath must be disproved by some means recited in C. P. 325.

Succession of Leonard, 21 A. 528; Huddleston vs. Coyle, 21 A. 148; McDonogh's Succession, 18 A. 445.

(L) Testimony of experts not binding on jury or judge.

Temple vs. Smith, 7 A. 562.

(M) Party proving signature may contradict his own witness.

Bell vs. Norwood, 7 L. 108.

326. Proof of Signature Denied Cuts Off Other defences—The defendant, whose signature shall have been proved after his having denied the same, shall be barred from every other defence, and judgment shall be given against him without further proceedings.

C. P. 828.

(A) Proof of signature when signature is denied cuts off all other defences.

Bradford vs. Cooper, 1 A. 525; Bayly & Pond vs. Givens, 29 A. 546; C. P. vs. Perry, 12 L. 12; Bank vs. Harrison, 24 A. 361.

(B) But denial must be express and special. Denial of execution no denial of signature.

Stockton vs. Truxton, 8 L. 224; Ware vs. Elam, 8 N. S. 529; Miller vs. 1 L. 486.

rule stated in text not applicable:

signature is not private, but when affixed to authentic

J. James vs. Rand, 48 A. 180.

Liabilities not incurred by failure to acknowledge signature to interrogatories:

vs. Harrison, 8 N. S. 299; 2 L. 420.

When signature denied is not that of defendant himself, that

Of agent.

Bayly & Pond vs. Givens, 29 A. 546.

Of decedent and is denied by administrator.

Bradford vs. Cooper, 1 A. 825.

Of partner.

Mutual National Bank vs. Richardson, 83 A. 1812

of proof is on plaintiff—particularly when denial of is on oath.

es vs. Rand, 48 A. 182; Robinson vs. Arnet, 15 L. 262; Succession of 88 A. 123.

Special Pleas—The defendant, though not bound to specially to all the allegations of the plaintiff, except called upon to avow or to deny his signature, nevertheless, if he intend to resist the action by some exception, plead the same expressly and in his answer, in all the cases hereafter pre-therwise he shall not be permitted to avail such exception afterwards.

pleas.

defendant must make specially:

judicata.

shell vs. Levi, 28 A. 946; Dwight vs. Simon, 4 A. 490.

d and error.

odore vs. Ins. Association, 28 A. 917; Pino vs. Ins. Co., 19 A. 214; nnedy vs. Ins. Co., 10 A. 809; Flynn vs. Ins. Co., 17 A. 185; yly & Pond vs. Stacy & Poland, 80 A. 1212; Palfrey vs. Stinson, 11 A. 77.

3. Prescription.

Edwards vs. Harrison, 23 A. 473; Mansfield vs. Doherty, 21 A. 836;
Fazende vs. Morgan, 31 A. 549; Perroux vs. Lacoste, 19 A. 206;
20 A. 509.

4. Waiver of protest.

Marsh vs. Waterman, 21 A. 377.

5. Want of capacity of plaintiff to sue.

Mason vs. Layton, 38 A. 675; Succession of Hatcher, 23 A. 137; Mor-
head vs. Thompson, 1 L. 282; Adams & Co. vs. Coons, 37 A. 306;
Stilley vs. Stilley, 20 A. 53.

6. That signature is not genuine.

Tesson vs. Gusman, 27 A. 266; Miller vs. Cohen, 1 L. 487.

7. All defences in avoidance or extinguishment of obligation
sued on; or which shows it to be void or voidable.

Byrne vs. Bank, 31 A. 84.

Such as breach of warranty in policy.

Benjamin vs. Indemnity Association, 44 A. 1017; Pino vs. Ins. Co.,
19 A. 214; Theodore vs. Ins. Co., 28 A. 917; Flynn vs. Ins. Co., 17
A. 135; 12 A. 35; 10 A. 809.

8. Plea to jurisdiction in court to issue a writ.

City vs. Waggaman, 31 A. 239.

9. Want of authorization of married woman.

Kent vs. Monget, 4 R. 172.

10. Discharge of surety by laches of plaintiff in giving time
to debtor or waiving any securities.

Hoffman & Co. vs. Atkins, 11 A. 172; Gas Light Co. vs. Hudson, 3
R. 486.

11. Offer to give possession of premises.

Williams vs. Bethany, 1 L. 318.

12. Unconstitutionality of a law.

State vs. St. Romes, 26 A. 753.

13. Estoppel.

Heirs of Wood vs. Nicholls, 33 A. 744.

14. Want of prior tender.

Heirs of Wood vs. Nicholls, 33 A. 744; 3 R. 357; Mary vs. Prager, 34 A.
56; 30 A. 1212; Ware vs. Berlin, 43 A. 535.

15. Payment.

Gleisses vs. Faurie, 6 L. 456; McKown vs. Mather, 19 L. 543; D'Aren-
bourg vs. Chauvin, 6 A. 778.

16. Remission and compensation.

Bludworth vs. Hunter, 9 L. 256; Mortimer vs. Trappan, 9 L. 109; White
vs. Moreno, 17 L. 371.

17. Discharge in bankruptcy.

Bloch vs. Fitch, 33 A. 1036.

3. That agent had no right to stipulate solidarity of obligation.

Gantt vs. Eaton & Barstow, 25 A. 507.

Then plea may be made:

Special plea filed at any stage of suit:

(a) Prescription.

Williams vs. Bethany, 1 L. 816; *Bank vs. Johnson*, 1 A. 246;

Fontenot vs. Husband, 2 A. 780; *Chew vs. Keane*, 2 L. 121.

Plea of prescription not supplied by court.

Mulholland vs. Scott, 33 A. 1045; *Gillis vs. Carter*, 29 A. 700; *Perroux vs. Lacoste*, 19 A. 266.

(b) *Res judicata*.

Williams vs. Bethany, 1 L. 816.

No special plea can be filed after judgment, on application for new trial.

Landry vs. Bangnon, 17 L. 83.

Burden on defendant:

Special defences must be proved as made.

Digge, Hobson & Co. vs. Parish, 18 L. 7; *Jones vs. Bishop*, 12 L. 397.

4. Defendant must prove plea of:

(a) Failure of consideration.

Kathman vs. Ins. Co., 12 A. 37; *Tissot vs. Bowles*, 18 L. 29; *Martin*

vs. Donovan, 15 A. 41; *Pack vs. Chapman*, 16 A. 366; *Wooton*

vs. Harrison, 9 A. 284;; *Brashear vs. Hazard*, 12 R. 529.

(b) But onus is on plaintiff to prove original consideration when such is denied.

Tissot vs. Bowles, 18 L. 29.

Waives general denial—when:

5. Special pleas, such as payment, tender, failure or want of consideration, waive general denial.

Avegno vs. Fosdick, 28 A. 109, *Ins. Co. vs. Blanks*, 35 A. 1176; *Norman*

vs. Fielding, 28 A. 142; *Martin vs. Dickson*, 35 A. 1033; *Babeock vs.*

Shirley, 11 L. 74; *Davis vs. Millaudon*, 14 A. 868; *Galls vs. Schooner*

Osceola, 14 A. 54.

6. *Aliter* as to novation.

Durham vs. Williams, 32 A. 962.

8. Incidental Demands by Defendant—The defendant in his answer, may allege facts different from those alleged by the plaintiff, and bring an incidental demand, if the same grows out of the action or is specially permitted by law.

P. 366, 374, 378.

Intervention not growing out of main action, nor special defence permitted by law, will be excluded.

Bryan vs. Atchinson, 2 A. 462.

329. No Replication or Rejoinder Permitted—When the defendant, in his answer, alleges on his part new facts, these shall be considered as denied by the plaintiff; therefore neither replication nor rejoinder shall be admitted.

(A) No replication nor rejoinder by plaintiff allowed; all means of defence are open.

Flood vs. Shambourgh, 8 N. S. 622; Skillman vs. Jones, 8 N. 687; Hickman vs. Dawson, 33 A. 488; Telle vs. Fish, 84 A. 1248; McMasters vs. Steward, 80 A. 546; Maillot vs. Wesley, 11 A. 467; Bayly & Pond vs. Stacey & Poland, 80 A. 1212.

(B) Answers by plaintiff.

1. To a reconvention.

Parker vs. Starkweather, 6 N. S. 611; but see squarely contra: Hunt vs. Spurlock, 8 L. 97; Suarez vs. Duralde, 1 L. 261; Bayly & Pond vs. Stacey & Poland, 80 A. 1212; Spaulding vs. Wallett, 10 A. 105.

2. To a third opposition of third owner claiming seized property.

Act 46 of 1886.

(C) Without replication or rejoinder, plaintiff may avail himself:

1. Of defendant's nonage or coverture; also of prescription.
D'Aquin vs. Colron, 8 L. 887.

2. Of defects in return to mandamus.

Borgstede vs. Clarke, 5 A. 291.

3. Of allegations in answer, to introduce evidence not covered by his own pleadings.

Riley vs. Wilcox, 12 R. 648; Holiday vs. Marleneaux, 9 R. 504.

4. Of evidence to show renunciation of prescription.

Segond vs. Landry, 1 R. 835.

5. Of evidence to defeat any allegations of defendant.

Muse vs. Yarborough, 11 L. 521; Corbett vs. Costello, 8 A. 437; Brown vs. Stone, 5 L. 4; Hickey vs. Sharp, 4 L. 836.

6. Of objection to answer on ground of vagueness in not stating demands with particularity.

Bayly & Pond vs. Stacey & Poland, 80 A. 1212; McMasters vs. Poland, 4 A. 881.

7. Of evidence to show that he did not warrant against reprobatory defects complained of by defendant.

Wright & Maury vs. Rogers, 18 A. 672; D'Aquin vs. Colron, 8 L. 882.

8. Of defects in tax title pleaded by defendant.

Hickman vs. Dawson, 83 A. 488; Telle vs. Fish, 84 A. 1248; McMasters vs. Steward, 11 A. 546; Mallot vs. Wesley, 11 A. 467.

(D) *Improper issues raised in answer excluded on objection to evidence to sustain them.*

Schneider & Zuberbier vs. Dreyfus, 21 A. 271; Lallande vs. Ball, 20 A. 198; Bayly & Pond vs. Stacey & Poland, 80 A. 1212; Jonan vs. Ferrand, 8 R. 864.

SECTION VII.

Of Exceptions and Defence.

330. Exceptions—Exceptions are means of defence used by the defendant to retard, prevent or defeat the demand brought against him.

But the word defence, in its more restricted acceptance, is only applied to such exceptions as go to the merits, showing that the action is neither just nor well founded.

C. C. 1882.

(A) *Waiver of exceptions:*

1. Trial on merits without insisting on exception is a waiver thereof.

Rowlett vs. Shepherd, 2 L. 88; Livingston vs. Dick, 1 A. 528; Cure vs. Porte, 18 A. 206; 14 L. 288; 4 L. 482; Powell vs. Graves, 15 A. 188; 1 N. 8. 180; 2 L. 644, 438; Francis vs. Levine, 26 A. 811; 7 L. 286, 268; Tupery vs. Edmondson, 32 A. 1146; Conrey vs. Harrison, 4 A. 249; Terrell vs. Boorman, 34 A. 801; Gay vs. Andry, 7 L. 551; Ashby vs. Ashby, 41 A. 139.

2. But decision on exception may be reversed for trial on merits.

Thibodaux vs. Comeau, 30 A. 1119.

(B) *Burden of proof is on exceptor:*

Gayoso vs. Garcia, 6 M. 325; Phipps vs. Snodgrass, 31 A. 88; Cure vs. Porte 18 A. 456; Barrow vs. Lepine, 30 A. 810; Buckner vs. Beard, 32 A. 227.

(a) Except where adversary is necessarily more cognizant of the fact.

Rugely, Blair & Co. vs. Gill, 15 A. 509.

(b) And except also where exception denies representative character of plaintiff.

Lea vs. Terry, 20 A. 429; Stilly vs. Stilly, 20 A. 53.

(C) *Sufficient interest in exception must exist in exceptor.*

C. P. 15; Montgomery vs. Koester, 35 A. 1093.

(D) *Exception waived below not revived on appeal.*
Reynolds vs. Rowley, 8 R. 202.

(E) *Ruling on exception is not res judicata.*

Levy vs. Wise, 15 A. 39; but see *Kirwin vs. Hibernia Ins. Co.*, 21 A. 229.

(F) *Exception of non-joinder need not state proper parties.*

St. Bomes vs. Cotton Press, 24 A. 419.

(G) *Trial of exceptions:*

1. Practice condemned of referring to merits exceptions which go to foundation of suit.

Farmer vs. Haffey, 36 A. 232; *Cockran vs. Violet*, 38 A. 535; *Jennett vs. Vickers*, 21 A. 679.

2. Notice of trial of exception necessary. *Ex parte* overruling illegal.

Terrell vs. Boarman, 24 A. 202.

331. Dilatory and Peremptory Exceptions—There are two principal species of exceptions; some are dilatory, others peremptory.

Dilatory exceptions are divided into declinatory and those simply called dilatory exceptions.

§ 1.

Of Dilatory Exceptions.

332. Dilatory Exceptions—Dilatory exceptions are such as do not tend to defeat the action, but only to retard its progress; declinatory exceptions have this effect, as when the exception of discussion is opposed by a third party, or by a surety, in an hypothecary action, or when an exception taken in order to call in the warrantor.

C. C. 1852.

333. Must be Specially Pleaded Before Issue Joined
Default—It is a rule which governs in all cases of exceptions, except in such as relate to the absolute incompetency of the judge before whom the suit is brought, that the

be pleaded specially *in limine litis*, before issue otherwise they shall not be admitted.

After no dilatory exceptions shall be allowed in case after a judgment by default has been taken; in every case they must be pleaded *in limine litis*; all such exceptions hereafter be allowed in any and every cause.

544; C. P. 333, 344.

Exceptions which should be pleaded in limine:

That beneficiary heirs can not enforce legal mortgage before final settlement of succession.

Cure vs. Porte, 13 A. 456; Babatham vs. Tete, 3 A. 73.

As pendens.

White vs. Gleason, 15 A. 479; Chaffe vs. Farmer, 35 A. 313; Long vs. Long, 3 R. 106; Weeks vs. Flower, 9 L. 330; Succession of Townsend, 37 A. 409; Stanton vs. Embry, 33 U. S. 533; Mix vs. Creditors, 30 A. 634.

Want of jurisdiction ratione personarum.

Tegarden vs. Powell, 15 A. 134; Hackett vs. Lenares, 16 A. 204; Taylor vs. Hill, 21 A. 639; Phipps vs. Snodgrass, 31 A. 33; Milton Nilson vs. Benjamin, 26 A. 537; Pironi vs. Riley, 39 A.; Gomilla & Co. vs. Milliken, 41 A. 117; Carroll vs. Bancker, 43 A. 1197.

Defect in petition not stating full name and residence of plaintiff.

Taylor vs. Littell, 21 A. 635; Parmely vs. Bradbury, 13 L. 333.

Immaturity of action.

Meaux vs. Pittman, 35 A. 330; Pecquet vs. Pecquet's Exr., 17 A. 204; Mortee vs. Edwards, 20 A. 237; Wilts vs. Rome, 13 A. 137; Penniston vs. Jefferson, 13 A. 133; Millaudon vs. Foucher, 13 L. 333.

Want of amicable demand.

Marloneaux vs. Downs, 19 A. 203; Morris vs. Crocker, 2 L. 474; Fox vs. Beebe, 2 L. 443; Howard vs. Columbia, 1 L. 153; Coon vs. Brashear, 4 L. 171.

Capacity of plaintiff to stand in judgment.

Dejona vs. Steamer Osceola, 17 A. 277; Lewis, Manson & Co. vs. Homes, Rex & Tracey, 23 A. 234; Legendre vs. Seligman, Hellman & Co., 35 A. 113; Parker vs. Moore, 2 A. 1017; Parish of St. John vs. Treasurer, 34 A. 330; Blaffer vs. Bank, 35 A. 251; 5 A. 233; 24 A. 472; 14 A. 633; 12 L. 613; 24 A. 472; 30 A. 1039; Canal and Navigation Co. vs. Tedesco, 37 A. 100; Montfort vs. Schmidt, 35 A. 730.

Want of a resolution of corporation authorizing suit.

Polar Star Lodge vs. Polar Star Lodge, 16 A. 53.

9. Plea of discussion.
Boone & Cockerham vs. Carroll, 35 A. 281; State vs. Bradley, 1 A. 643;
Dwight vs. Linton, 3 R. 57.
 10. Vagueness and want of precision in petition.
Doullut vs. McManus, 87 A. 800.
 11. Exception to right of defendant to reconvene.
Saloy vs. City, 33 A. 79.
 12. That claim of plaintiff is joint against other persons.
Rothchild vs. Bowers, 2 R. 380; Dunbar vs. Murphy, 11 A. 713.
 13. Minority of defendant.
Smith vs. Braun, 37 A. 225.
 14. That executors or curators are not qualified.
Marais vs. Callier, 39 A. 1089; Silliman vs. Mills, 23 A. 206; Wingate vs.
Wheat, 6 A. 239; Wells vs. Wells, 23 A. 224; Rabaitham vs. Tete, 8 A. 73.
 15. Non-joinder or misjoinder.
Brewer vs. Cook, 11 A. 637.
 16. Objections to form of action.
Lotz vs. Folger & Lotz, 10 A. 20.
 17. That defendant is not administrator, etc.
Chéevers vs. Burke, 19 L. 430.
 18. Motion to dissolve attachment.
Myers vs. Perry, 1 A. 372.
- (B) *Pleas or exceptions which should precede answer and not appear therein:*
1. *Lis pendens.*
Mix vs. Creditors, 39 A. 624; Chaffe vs. Ludeling, 34 A. 966; Boone vs.
Carroll, 35 A. 281.
 2. Plea to jurisdiction *ratione personæ.*
Mix vs. Creditors, 39 A. 624; Staunton vs. Embry, 93 U. S. 554; Gordon
vs. Gilford, 99 U. S. 169; but see Tupery vs. Edmondson, 32 A. 1145,
where it appears that exception may be pleaded in answer, pro-
vided it precede plea to merits.
- (C) *No evidence receivable to support exception filed too late.*
Case vs. Watson, 21 A. 731.
- (D) *Prior to 1839 dilatory exceptions could be pleaded in answer,
and even after default.*
Chaffe vs. Ludeling, 34 A. 965; Mix vs. Creditors, 39 A. 624; Boone vs. Car-
roll, 35 A. 281.
- (E) *Exception must specifically point out defect of proceeding.*
Scott, Carhart & Co. vs. Jackson, 12 A. 640.

§ 2.

Of Declinatory Exceptions.

4. Declinatory Exceptions—Declinatory exceptions tend to defeat the demand, but only to decline the jurisdiction of the judge before whom it is brought.

In such cases, the defendant contends that he is not competent to plead before the court in which the action has been brought.

C. 1882.

5. Kinds of Declinatory Exception—There are two kinds of declinatory exceptions:

Jurisdiction of Court—When the exception is taken on the ground of incompetency of the judge, pursuant to the rules above mentioned.

Lis Pendens—When it arises from the fact of another suit being pending, between the same parties, for the same object, and growing out of the same cause of action, before another court of concurrent jurisdiction.

In both cases the suit must be dismissed, and the plaintiff decreed to pay costs.

C. 2236; C. P. 94, 492, 532.

Exception of lis pendens. Par. 2.

Leveau vs. Lesparre, 17 L. 498; *Dick vs. Gilmer*, 4 A. 520.

Exception must show:

Pendency of another suit.

Taylor vs. Hill, 21 A. 639; *Bischoff vs. Theures*, 8 A. 18; *Kline vs. Freret*, 5 A. 494.

Before court of concurrent jurisdiction.

Succession of Ludenig, 3 R. 98; *Succession of Townsend*, 87 A. 409.

Between same parties.

State vs. Kreider, 21 A. 482; *Ingram vs. Richardson*, 2 A. 839.

For same cause of action.

Express Co. vs. Haven, 41 A. 811; *Succession of Brown*, 28 A. 808; *Bank vs. Walden*, 1 A. 46; *City vs. Walker*, 28 A. 808; *Morgan vs. Tamlet*, 21 A. 266; *Ingram vs. Richardson*, 2 A. 839; *French vs. Landis*, 12 R. 635.

5. And that the courts are both in this State.

Stone vs. Vincent, 6 N. S. 317; Peyroux vs. Davis, 17 L. 479; West
McConnell, 5 N. S. 424; Godfrey vs. Hall, 4 L. 154.

**(B) Proceedings which are non-judicial can not be set up in plea
lis pendens.**

Carre vs. City, 41 A. 393.

**(C) Question of lis pendens can not be raised by mere suggestion
brief.**

Succession of Townsend, 37 A. 403.

(D) Suit in State court no bar to like suit in Federal court.

State ex rel. City vs. E. R. Co., 42 A. 11, 13; Adams vs. Lewis, 7 N. S.
Schmidt vs. Brannon, 10 A. 26; Gordon vs. Gilfoil, 99 U. S. 162, 173; State
vs. Embrey, 36 U. S. 553.

**(E) Defendant in exception of lis pendens may elect in what tri-
nal to continue.**

Schmidt vs. Brannon, 10 A. 26.

336. Time of Plea of Declinatory Exception—Declinatory exceptions may be pleaded in the defendant's answer previous to his answering to the merits; but, except relates to the declinatory exceptions, the defendant must plead in his answer all dilatory or peremptory exceptions on which he intends to rely, or which he is bound to plead expressly and specially, pursuant to the provisions of this Code.

C. P. 323; C. P. 336 prevails over C. P. 323; Chaffe vs. Ludeling, 34 A. 263.

(A) Declinatory exceptions may be pleaded in answer, but must precede answer to merits:

1. Plea to jurisdiction *ratione personarum*.

Tupery vs. Edmondson, 32 A. 1146; Goodrich vs. Hunton, 31 A. 533.

2. Prematurity and want of amicable demand.

McGuire vs. Peck, 14 L. 183.

3. Want of authority in surviving partner to sue for partnership debts.

Flower vs. O'Connor, 7 L. 124; Notrebe vs. McKinney, 6 R. 13.

4. Plea of discussion.

Chaffe vs. Ludeling, 34 A. 263; Dwight vs. Linton, 3 R. 57; State vs. Bradley, 11 A. 643.

5. Dual capacity of plaintiff.

Ashbey vs. Ashbey 33 A. 302.

6. Want of identity of plaintiff firm.

Magee et al. vs. Dunbar, 10 L. 547; Beyr's vs. Spor, 22 A. 16.

§ 3.

Of the Recusation of Judges.

Recusation—Recusation is the refusal, on the part of the defendant, to have his cause tried by the judge before whom he has been sued, on account of the ties of relationship existing between such judge and the plaintiff, or other just causes hereafter expressed.

S. 5190.

Causes of Recusation—The causes for which a judge may be recused are:

Interest—His being interested in the cause; provided, that in all civil and criminal causes in which the State, the parishes, or political or religious corporations are interested, it shall not be sufficient cause to challenge the judge or justice of the peace, who may have cognizance of the case, (nor the sheriff or the executive officer, or any of the jurors who are called to serve in the cause,) that they are citizens or inhabitants of the State, or members of the said political or religious corporations, or that they pay any State, parish or local tax;

Relationship—His being related to one of the parties within the fourth degree;

Previous Employment—His having been employed as counsel or advocate in the cause.

C. 890; R. S. 547, 8974; Const. 1868, Art. 90.

Causes of recusation:

P. 338, amended by Act 35, of 1882, to read as follows:

The causes for which a judge shall be recused are:

- (a) His being interested in the cause; provided, that in all civil and criminal causes in which the State, the parishes, or political or religious corporations are interested, it shall not be sufficient cause to challenge the judge or justice of the peace, who may have

cognizance of the case (nor the sheriff or the execution officer, or any of the jurors who are called to serve the cause), to allege that they are citizens or inhabitants of the State or of the parishes, or members of the political or religious corporations, or that they pay State, parish, or city tax.

- (b) His being related to one of the parties within fourth degree.
- (c) His having been employed, or consulted as advocate in the cause.
- (d) His being the father-in-law, son-in-law, or brother-in-law of one of the parties.
- (e) His having performed any judicial act in the cause in any other court.

(B) Act 40 of 1880 regulates recusation of district judges outside Orleans and appointment of judge to try.

Section 1 is substantially same as Act 35 of 1882.

Section 2. That in all cases in which a district judge shall be recused, except for cause of interest, he shall for the trial thereof appoint a lawyer having the qualifications of the district court in which the recused case is pending, and if no lawyer having the necessary qualifications can be obtained at the term of court at which the recusation is declared, the judge (recused) shall immediately appoint some district judge of an adjoining district to try the case, who shall be notified of his appointment in the manner provided in Section 3 of this act.

Section 3. That in cases in which a district judge shall be recused for cause of interest, he shall, for the trial thereof, appoint some district judge of an adjoining district, and in all such cases and in cases where a district judge may be appointed under Section 2 of this act, the order of the court making the appointment shall be entered on the minutes thereof and it shall be the duty of the clerk of said court to make out a certified copy of the order from the minutes, under seal of court, and forward the same immediately to the sheriff of the parish or residence of the judge so appointed, or of the parish where said judge may be at the time, to be by him, the sheriff, served on said judge.

Section 4 directs judge appointed to try case as speedily as possible.

Section 5 provides that if in nine months case is not tried by judge appointed, district judge shall transfer case to nearest judge competent to try same and clerk shall send original papers and certified copy of all entries on minutes, etc.

87 A. 393.

Section 6 provides that judge or lawyer appointed shall exercise full powers of judge appointing.

Section 7. That Sections 2, 3, 4, 5 and 6 of this act shall not apply to Orleans parish.

Recusation of judge and district attorneys in criminal cases:

1. See Revised Statutes, Sec. 1067, and Act 35 of 1877, p. 35.

2. Act 35 of 1877 is repealed by Act 40 of 1880.

State ex rel. Jones vs. Judges, 41 A. 319.

Transfer of case in event of recusation.

See Act 70 of 1876, p. 111.

Interchange of district judges to try recused cases.

Act 74 of 1884, p. 96.

By Act 171 of 1894, judge of adjoining country district has power to act when judge of neighboring district can not act.

Trial of contested election cases in cases of recusation.

Act 129 of 1877, E. S., p. 197.

This act is constitutional.

State ex rel. Schwing vs. Fontelleu, 33 A. 1122.

Trial of recused cases in courts of appeal.

Act 10 of 1880, p. 17.

Judge incompetent to decide plea to his own recusation:

1. He must refer plea to judge *ad hoc* or to judge of next district.

State ex rel. Segura vs. Judge, 37 A. 253; State ex rel. Trimble vs. Judge, 33 A. 247; Nugent vs. Stark, 34 A. 623; Tyrrel vs. Judge, 33 A. 1293; Succession of Hyams, 30 A. 460.

2. But where the motion to recuse states no cause provided by law as ground for recusation, judge may set same aside as frivolous.

State vs. Chantlain, 42 A. 719.

Appeal from refusal to recuse:

1. Appeal lies from order refusing to recuse.

Fields vs. Gagne, 33 A. 339; Jarreau vs. Choplin, 6 L. 133.

2. But no appeal lies from order recusing.

Id.; *Fontellieu vs. Judge*, 51 A. 47; *Board of Church Wardens vs. Perohe*, 86 A. 161.

(J) Recusation of one judge of civil district court not reviewable by another.

State ex rel. Mexican International Improvement Co. vs. Voorhies & King, 41 A. 567.

(K) Plea of recusation must be timely; else objection waived.

Id.; *Pironi vs. Riley*, 89 A. 802; *Eicks vs. Gantt*, 85 A. 920.

(L) Causes of recusation:

Succession of Lacroix, 80 A. 924.

1. Relationship.**(a) But relationship beyond fourth degree no cause of recusation.**

Improvement Co. vs. Judge, 41 A. 568.

(b) Except in criminal cases where relationship by blood or marriage in any degree is cause for recusation.

State ex rel. Provosty vs. Judge, 27 A. 226.

2. Former employment as counsel.

Nugent vs. Stark, 84 A. 628; *State ex rel. Provosty vs. Judge*, 27 A. 226; *Macker vs. Varnado*, 19 A. 881; *State ex rel. Segura, vs. Judge*, 57 A. 258; *State vs. Trimble*, 88 A. 248; *Bryan vs. Austin*, 10 A. 612; *State vs. Judge*, 27 A. 226; 85 A. 1298; *Board vs. Perohe*, 86 A. 160.

(a) But only when the party whom the judge represented is still before the court.

Bryan vs. Austin, 10 A. 612; *Eicks vs. Gantt*, 85 A. 921.

(b) And when issues are the same.

Steward vs. Mix, 80 A. 1088.

3. Pecuniary interest in litigation.

Succession of Rhea, 51 A. 528.

4. Performance by judge of any judicial act in the cause in any other court.

But this was no cause for recusation in 1854.

Edwards vs. Wife, 9 A. 521.

(M) Causes of recusation stated are exclusive.

Judge not recusable because he is material witness.

State vs. Barnes, 84 A. 899; R. 9. 8967.

(N) Trial within nine months from date of recusation.

This provision is directory and right to trial not prescribed after nine months.

MacKensie vs. Tax Collector, 89 A. 944.

Judge ad hoc:

1. His oath.

Judge *ad hoc* must take oath, but where record does not show that he did not take oath, presumption *omnia rite acta* applies.

State vs. McCoy, 29 A. 594; *Nugent vs. Stark*, 34 A. 629.

2. His qualifications.

(a) District attorney not disqualified because he is office-holder.

State ex rel. Cole vs. Chargois, 30 A. 1103.

(b) Or a witness.

State vs. Barnes, 34 A. 339.

(c) Qualifications are same as those of judge.

State vs. Revells, 34 A. 383.

(d) Must have been a lawyer practising required number of years.

Gullbeau vs. Cormier, 32 A. 381.

(e) Need not be a resident of parish, but must be a resident of judicial district.

State vs. Revells, 34 A. 383.

(f) Possibly he need not be even a resident of judicial district.

State ex rel. Gates vs. Judge, 38 A. 456.

Where no lawyer will accept.

Case transferred to adjoining district.

State ex rel. Fuqua vs. Judge, 29 A. 816; *State ex rel. Gates vs. Judge*, 38 A. 452.

No mandamus to judge ad hoc to serve.

Service is purely voluntary.

State ex rel. Cole vs. Chargois, 30 A. 1103; *State ex rel. Fuqua vs. Judge*, 29 A. 816; *State vs. Revells*, 34 A. 383.

But curator *ad hoc* can not decline and so defeat jurisdiction of court.

Thayer vs. Tudor, 2 A. 1019.

No collateral attack on the capacity of judge ad hoc. His acts are valid.

Gullbeau vs. Cormier, 32 A. 380.

Aliter when his appointment is absolutely without warrant in law.

State vs. Phillips, 27 A. 665, 689, 563.

(S) *Lawyer appointed or judge to whom case transferred has full power to act.*

Halphen vs. Guilbeau & Broussard, 38 A. 727; State ex rel. Gates vs. Judge, 38 A. 452; State ex rel. Ludeling vs. Judge, 39 A. 794.

(T) *Power to appoint lawyer:*

Judge recused, except for personal interest, has power to appoint lawyer to act in place of judge *ad hoc* who declines.

State ex rel. Ludeling vs. Judge, 39 A. 794; Succession of Hyams, 30 A. 460.

(U) *Acts of judge ad hoc valid:*

1. Acts of judge *ad hoc* are valid, even if appointment is null for want of qualifications.

Guilbeau vs. Cormier, 32 A. 931; New Orleans Canal and Banking Co. vs. Tanner, 26 A. 274; Burke vs. Tregre, 22 A. 629.

2. But when appointment is absolutely unauthorized, his acts are null.

Braugh's Case, 27 A. 563.

(V) *Rule to recuse.*

Service may be on judge out of parish of domicile.

State ex rel. Schwing vs. Fontelleu, 30 A. 1122.

(W) *Court transferring cause to another loses jurisdiction:*

Clerk of court where case ultimately tried certifies the proceedings, not clerk where suit originated.

McIntyre vs. Whiting, 6 L. 36.

(X) *Motion to recuse not timely—when:*

On motion for new trial.

Ricks vs. Gantt, 35 A. 922.

(Y) *Recusation in appellate court:*

Appellate as well as original judges recusable.

State ex rel. Segura vs. Judge, 37 A. 253.

(Z) *Order of recusation not reviewable—when:*

Judge of court of co-ordinate or concurrent jurisdiction has no power to review order of recusation of other judge.

State ex rel. Mexican International Improvement Co. vs. Judge, 41 A. 557.

339. **Affinity**—Affinity is not a good cause of recusation, except when the judge is the father-in-law, son-in-law, or brother-in-law of one of the parties.

40. **Judge's Recusation of Himself**—The judge may recuse himself, but only in such cases where the parties themselves would have the right of recusing him.

Ex proprio motu recusation:

1. Judge may recuse himself *ex proprio motu* in proper cases.

Nugent vs. Stark, 84 A. 629; Gibson vs. Selby, 2 A. 629.

2. But only when he could be recused by party.

Beaulieu vs. Furst, 2 A. 46.

Until recused, judge has full power:

Until lawfully recused, judge is competent.

Gibson vs. Selby, 2 A. 629; Nugent vs. Stark, 84 A. 626; 10 A. 612.

41. **Trial of Recused Cases**—The decision of cases where the judge is recused, is provided for in the following article, pursuant to the constitution.

Art. 112, Constitution of 1868.

42. **Mode of Trial of Recused Cases**—In any case when a judge may be recused, and when he is not personally interested in the matters in contestation, he shall select a referee having the qualifications required for a judge of the court, to try such cases.

And when the judge is personally interested in the suit, he shall call upon the parish or district judge, as the case may be, to try the case.

R. S. 8190; Constitution of 1879, Art. 112; Art. 90, Constitution of 1868.

When judge personally interested:

He shall call judge of adjoining district.

He can not appoint lawyer nor perform any act save recusation.

State ex rel. Welsh vs. Judge, 21 A. 51; Succession of Hyams, 80 A. 460; State ex rel. Hunter vs. Judge, 29 A. 786; State vs. McCoy, 29 A. 594; State ex rel. Tyrrell vs. Judge, 88 A. 1288; State ex rel. Segura vs. Judge, 37 A. 253; State ex rel. Nolan vs. Judge, 89 A. 994; Board of Wardens, vs. Perche, 86 A. 160; Ricks vs. Gantt, 85 A. 920.

He can not determine plea of recusation, however unfounded it may be.

Succession of Hyams, 80 A. 460; State ex rel. Segura vs. Judge, 37 A. 253.

Nor rescind order of recusation.

Appeal lies from rescinding order.

Fields vs. Gagne, 22 A. 229; *State ex rel. Fontellieu vs. Judge*, 47 A. 47.

(C) When is judge personally interested?

1. When his wife is party, whether they be separated in property or not.

Succession of Hyams, 20 A. 460.

2. When he is on the account filed as a creditor.

Succession of Cabrol, 28 A. 637; *Succession of Rhea*, 21 A. 232.

3. Where judge assigns claim against estate and assignee is on the tableau.

Succession of Jan, 42 A. 924.

(D) When not legally recusable, judge can not appoint lawyer.

State vs. Phillips 27 A. 625; *State vs. Fritz & O'Brien*, 27 A. 629.

§ 4.

Of Peremptory Exceptions.

343. Peremptory Exceptions—Peremptory exceptions are those which tend to the dismissal of the action.

Some relate to forms; others arise from the law.

C. C. 1262.

(A) No reference of exceptions to merits:

Peremptory exceptions affecting foundation of suit should be decided *in limine* and not referred to merits.

Farmer vs. Hufley, 26 A. 232; *Jennings vs. Vickers*, 21 A. 621; *Pollard vs. Brookshier*, 21 A. 729.

But if referred, the exception is not waived.

Cladlin Co. vs. Feibleman, 44 A. 512.

(B) Mere erroneous legal conclusions are no grounds for exception.

Where petition states all essential allegations, mere erroneous legal conclusions recited will not justify exception of no cause.

Bank vs. Legendre, 25 A. 726.

344. Peremptory Exceptions Founded on Form—Peremptory exceptions relating to forms, are those which

to have the cause dismissed, owing to some nullities in the proceedings.

Such exceptions must be pleaded *in limine litis*, that is, say, at the beginning of the suit, and before answering on the merits.

After the defendant has pleaded to the merits, such exceptions shall not be heard; all nullities are cured.

D. P. 583 and notes.

5. Peremptory Exceptions Founded on Law—Peremptory exceptions, founded on law, are those which, without going into the merits of the cause, show that the plaintiff can not maintain his action, either because it is barred or because the cause of action has been destroyed or extinguished.

D. U. 3464, 3465; C. P. 789, 902.

For purposes of exception, allegations taken for true; so when exception pleaded is:

1. No cause of action.

Boulligny vs. Gary, 21 A. 642; Shelmerdine vs. Duffy, 4 N. S.; Hiestand vs. New Orleans, 14 A. 125; 28 A. 13; 33 A. 108; 13 A. 179, 205; DeBlanc vs. Gary, 21 A. 689; Cavellier vs. Police Jury, 24 A. 272; Hastings vs. Brantley, 21 A. 516.

2. Want of proper parties.

Kirwin vs. Hibernia Ins. Co., 51 A. 329.

Particularity of allegations of exception.

Pleas of payment, compensation, error, fraud, etc., must be set forth with particularity.

Boagni vs. Anderson, 32 A. 920; Bayly & Pond vs. Stacey & Poland, 30 A. 1212.

6. At What Time Pleaded—Peremptory exceptions, founded on law, may be pleaded in every stage of the action, previous to the definitive judgment; but they must be pleaded specially, and sufficient time allowed to the adverse party to bring his evidence.

D. C. 3465, 3468; C. P. 327, 507, 789.

(A) Peremptory exceptions founded on law pleadable at any stage of the cause; such as:

1. That plaintiff is without interest and absolutely has no right to sue.

Cure vs. Forte, 18 A. 456; Union Bank vs. Dunn, 17 L. 284; Montfort vs. Schmidt, 38 A. 750; Hosea vs. Miles, 18 L. 108; Weller vs. Van Hove, 42 A. 600.

2. Payment.

Reimers vs. Ceram, 19 A. 207; 6 L. 455.

3. No cause of action for matters founded on law.

Fletcher vs. Dunbar & Co., 21 A. 159; Martin vs. McMasters, 14 L. 422; Tuleton, Whiting & Tullis vs. Kennedy, 21 A. 500; Weller vs. Van Hove, 42 A. 600.

This exception pleadable after answers to interrogatories on facts and articles.

Godwin vs. Neustadt, 42 A. 735.

4. Prescription.

Canal Bank vs. Martin, 23 A. 210; Lejeune vs. Hebert, 6 R. 419; Nuge vs. Buisson, 35 A. 113; but see Mansfield vs. Doherty, 21 A. 395.

Party must indicate what prescription is pleaded.

Gaines vs. Succession of Del Campo, 30 A. 245.

5. Inconsistency of plaintiff's demand.

L'Homme vs. Kerlegand, 4 L. 354; Montross vs. Hillman, 11 R. 87.

6. *Res judicata*.

Succession of McDonogh, 24 A. 84.

7. Discharge in bankruptcy.

Block vs. Fitch, 45 A. 1094.

8. Compensation.

Buhlman vs. Smith, 15 A. 670; Bogni vs. Anderson, 32 A. 920.

9. Reconciliation of husband and wife since filing of suit for separation or divorce.

Holbrook vs. Holbrook, 18 A. 643.

(B) Pleas must be filed in case, not merely suggested in brief.

Chase vs. Davis, 29 A. 201.

(C) But no plea can be made after submission of case to judge.

Gayarre vs. Millaudon, 28 A. 305; O'Hara vs. City, 30 A. 152.

(D) Following exceptions are not peremptory exceptions going to extinguish the action.

1. Usury.

Flower vs. O'Connor, 4 L. 129.

2. *Lis pendens*.

Schmidt vs. Brannon, 10 A. 28.

ect on default.

remptory exception does not set aside default.

State ex rel. Borland vs. Judge, 30 A. 155.

ception as answer.

remptory exception of no cause of action can not stand as answer.

State ex rel. Negrotto vs. Judges, 46 A. —; Wood vs. Henderson, 2 A. 220; Eulalie vs. Long, 9 A. 11; Delacroix vs. Gaines, 18 A. 177; Lea vs. Terry, 20 A. 428; Smith vs. Donnelly, 27 A. 98; see Mayem vs. Bloomfield, 29 A. 398; 15 A. 159; Robbins vs. Martin, 43 A. 488.

SECTION VIII.

Of Interrogatories on Facts and Articles.

. Facts and Articles—Both plaintiff and defendant permitted to annex, either to their petition or their answer, interrogatories on facts and articles.
S. 548, 5987.

terrogatory may be on facts raised on trial of exception.

Gehee vs. Brown, 3 A. 272.

t what time allowed.

ot after trial has begun.

Gravier's Curator vs. Cullion, 11 L. 271; Cooe vs. Lacour, 4 L. 511; Dabbs vs. Hempken, 3 R. 123; Brooks vs. Walker, 3 A. 150.

(a) But this would seem to apply only when answers require recourse to books or papers, for which delay is necessary.

(b) Where no delay is necessary, party may be interrogated, even on trial.

Demoulin vs. Anglaise, 1 A. 408.

3. Definition—Interrogatories on facts and articles questions put in writing, in the form of articles, and annexed to a petition or to an answer, to which one of the parties to the suit prays that the other be ordered to answer, under oath, in order to make use of his answers as testimony in support of his demand, or to aid him in his defence.

P. 352.

answers part of record:

no formal introduction in evidence necessary.

Burkett vs. Hopson, 19 A. 489; McKerall vs. McMillan, 9 R. 19; Walker vs. Villavaso, 18 A. 715.

(B) Answers given in another case:

May be used when taken between same parties for same cause.

Whiting vs. Ireys, 8 A. 649; Walker vs. Villavaso, 18 A. 717.

(C) No order to answer will be granted:

1. When answers or taking *pro confessis* would not sustain petition or defence, or when questions raise issues not up in pleadings.

Butler vs. Stewart, 18 A. 554; Kenner vs. Peck, 2 A. 938; White Moreno, 17 L. 871.

2. When answers are not to be in open court.

Blanchin & Girard vs. Pickett, 21 A. 681.

(D) Answers must be given in open court or under commission otherwise excluded.

Kirtland vs. Harris, 20 A. 153.

(E) Questions not having been answered by fault of clerk, time given party propounding.

Wall vs. Bry, 1 A. 312.

(F) Order to answer when necessary:

1. Necessary only when answers are to be given in open court.

Blanchin & Girard vs. Pickett, 21 A. 681; Seaman, Beck & Co. Babington, 11 A. 178; Cox vs. Mitchell, 7 L. 522; Magee vs. Dunbar, 10 L. 546, 551; Polo vs. Natali, 14 L. 280; Derbes vs. Decuir, 5 R. 491.

2. Notice or service. Service may be domiciliary—not necessarily personal.

Spears vs. Nugent, 2 A. 11; Blanchin & Girard vs. Pickett, 21 A. 681.

3. Certainty as to time within which to answer. Day and date which answers are required must be fixed and certain.

Derbes vs. Decuir, 5 R. 491; Spears vs. Nugent, 2 A. 11.

349. Answers to Interrogatories—The party interrogated on facts and articles is bound to answer, on oath and categorically, each of the questions put to him, unless he can not do so without confessing himself guilty of some crime.

Failure to Answer; Answers by Women—Except in the above case, if the party interrogated refuse or neglect to answer on oath to all the questions put to him, the fact

cerning which he shall have so refused or neglected answer, shall be taken for confessed, provided that no party shall make an order requiring a female to answer interrogatories on facts and articles, in open court, unless the party propounding them, or his or her agent or attorney, shall make oath, to the materiality of the interrogatories, and that they are not propounded for the purpose of the hope of having them taken for confessed, but in the bona fide desire to have them truly answered by the party interrogated.

R. S. 3968; C. C. 2291; C. P. 136, 351; Const. 1868, Art. 6.

Who may be interrogated:

1. **Executor.**

Delacroix vs. Prevost's Ex's, 6 M. 730.

2. **Administrator.**

Blanchin & Giraud vs. Pickett, 21 A. 680.

3. **Parties to suit, but not third persons. Garnishees are parties to suit and may be required to answer in open court.**

Petway vs. Goodin, 12 R. 445.

4. **All the parties in a suing firm.**

McCloskey, Bigly & Co. vs. Wingfield, 52 A. 43.

When not compelled to answer:

When answer would subject to penal liability.

Shepherd vs. Payson, 16 A. 360.

Taking pro confassis; such taking is authorized:

1. **When there is failure or refusal to answer.**

Blanchin & Giraud vs. Pickett, 21 A. 680; Cox vs. Mitchell, 7 L. 521; Magee vs. Dunbar, 10 L. 551; Polo vs. Natill, 14 L. 260; Leekie vs. Scott, 10 L. 416.

But not without an order directing answers to be filed within given delay.

Stewart vs. Carlin, 2 L. 73; Lapene vs. Terre & Bloche, 15 A. 612; Weathersley vs. Huddleston, 2 A. 845; Spears vs. Nugent, 2 A. 11. See contra, Seaman, Beck & Co. vs. Babington, 11 A. 173; Derbes vs. Decuir, 5 R. 491.

2. **When answers are not responsive.**

Walker vs. Wingfield, 16 A. 300; Haughery vs. Lee, 17 A. 1.

Aliter when fully responsive.

Marks & Co. vs. Reinberg, 16 A. 343.

(D) No formal motion to make for confessed necessary.

McCloskey, Bigly & Co. vs. Wingfield & Bridges, 52 A. 38; Knight
Murchison, 1 R. 31; Hoover vs. Miller, 6 A. 204.

(E) Motion not referred to jury.

Knox vs. Thompson, 12 A. 114.

(F) Answer in open court:

Order thereto absolutely necessary.

Blanchin & Giraud vs. Pickett, 21 A. 680; Commercial Bank vs. K
8 R. 248.

(G) Where rendered.

Order to answer in open court rendered only where party
sides in the parish where suit is pending.

Walker vs. Copley, 1 A. 247.

(H) Answers not objected to considered.

Call vs. Herwig, 18 A. 313.

(I) May be used on subsequent trial.

Bachemlin vs. Schnellnadre, 16 A. 32.

(J) Sufficient if responsive though not categorical.

Bond vs. Bishop, 18 A. 547; Haughery vs. Lee, 17 A. 1; Lewis vs. Deco
5 N. S. 650.

(K) Unresponsive answers stricken out on preliminary motion.

McLean & Kendall vs. Hunsicker, 29 A. 542.

(L) Answers may be on one sheet of paper, oath on another.

Roy vs. Wiley, 2 L. 315.

(M) Answers may be in any language.

Gabaroche vs. Hebert, 7 N. S. 527.

350. Oath to Obtain Order to Answer Interrogatories

To enable the defendant to obtain the answer of the
plaintiff to interrogatories, he shall subjoin to the inter-
rogatories proposed to be answered, his affidavit of the
materiality, and that in his opinion the answer of the
plaintiff would assist him in making his defence; but the
party interrogated may object in writing to any of the
questions as not pertinent, and the judge shall decide
summarily whether he ought to answer or not; if ordered

answer, he must do it, otherwise the facts unanswered will be deemed confessed.

When asked for delay:

Interrogatories intended evidently for delay will be stricken out.

Parker vs. Hewitt, 1 R. 11.

May be withdrawn:

Interrogatories may be withdrawn.

Mackin vs. Bowley, 1 R. 82.

51. Only Party residing in Parish May Be Interrogated on Facts, etc., in Open Court—The party propounding the interrogatories may require the party interrogated to answer in open court, and in his presence, on the day appointed to that effect by the judge, if the party interrogated reside in the parish where the court holds its sittings.
C. P. 849.

Party required to answer in open court.

Must reside in parish.

Walker vs. Copley, 1 A. 247; Crocker vs. Turnstall, 6 R. 334.

And when residing out of parish, answers must be under a commission.

Gabaroche vs. Hebert, 7 N. S. 527.

And party who must answer must see to execution of commission.

Clarke vs. Jones, 1 R. 78; Allain vs. Truxillo, 14 L. 297.

Supplemental interrogatories:

1. Not allowed without notice to other side.

Read vs. Bailey, 1 M. 841.

2. May be answered, though original ones were not.

Woolsey vs. Paulding, 4 M. 524.

Fixed day must be appointed, else answers need not be given.

Stewart vs. Carlin, 2 L. 73; Petway vs. Goodin, 12 R. 445; Davis vs. Davis, 8 A. 91; Allain vs. Truxillo, 14 L. 299; Weathersby vs. Huddleston, 2 A. 845; Derbes vs. Decuir, 5 R. 491; Compton vs. Pearce, 7 L. 335.

Answers must be given in open court, written down by clerk in presence of judge and opposing counsel. When written out of court and sworn to in court, they are insufficient.

Nicholson vs. Shepard & McDorman, 10 A. 533.

(G) Prepared answers not admitted, but witness may refer memoranda.

Peters vs. Gibson, 11 A. 97.

(H) When not required to be given in open court, they may be made to before justice of peace.

Hoff vs. Freeman, 15 A. 240.

(I) Answers under interrogatories by party out of State must be under commission from court and mere appearance before Louisiana commissioner not sufficient.

McCloskey, Bigly & Co. vs. Wingfield & Bridges, 32 A. 43.

352. Non-resident Must File Answers—In all cases where a party interrogated resides out of the parish where the suit is pending, and whether within or without the State, it shall be his duty to file his answer to the interrogatories propounded to him within such period as shall be fixed by the court, on the motion of the party interrogating, and notice of which order, fixing the delay, together with a copy of the interrogatories propounded, shall be served on the attorney representing the party interrogated, provided, that when the party interrogated resides out of the State, his answers shall be taken by commission.

R. S. 549, 608, 2100, 3968.

(A) Service need not be personal.

Blanchin & Giraud vs. Pickett, 21 A. 681.

(B) But want of service of notice not ground for annulling judgment.

McKnight vs. Connell, 14 A. 396.

353. Answer to Interrogatories—In answering a question, the party must simply confess or deny the fact.

Nevertheless, the party interrogated may state some other facts tending to his defence, provided they be closely linked to the fact on which he has been questioned and an appeal made to his conscience. His declarations, in such case, shall have as much effect as his answer to the question itself.

Scope of answers:

Party interrogated may state all facts necessary to explain his answers.

Tegarden vs. Mordica, 15 A. 184; Broxton vs. Bloom, 15 A. 618; Woodruff vs. Dodd, 15 A. 644; Quirk vs. Haakins & Co., 15 A. 656; Lauve vs. Bell, 1 L. 136; Owen vs. Brown, 13 A. 201; Hoover vs. Miller, 6 A. 205; Williams vs. Vance, 2 A. 910; Smith vs. Richardson, 11 R. 518; Baker vs. Garick, 9 R. 127; Wells vs. Hickman, 6 R. 2; Jocum vs. Roy, 3 M. 410; Ross vs. Ross, 9 R. 173; Haynes vs. Heard, 3 A. 648; 29 A. 540.

But matters not responsive to interrogatory, nor closely linked hereto, will be stricken out.

Williams vs. Vance, 2 A. 910; Wells vs. Hickman, 6 R. 1.

When answers may be filed:

At any time before trial of case, provided no special order is made to file earlier.

Huff vs. Freeman, 15 A. 241.

Evasive answers:

Construed against party answering.

Byrd vs. Bowie, 7 M. 418; Barrow vs. Sterling, 7 M. 29.

No answers by agent.

Buford vs. Valentine, 7 M. 416.

Answers may be separate from answer to merits.

Seat vs. Erwin, 7 M. 127.

Answers sworn to abroad:

Authority of officer must be shown.

Center vs. Stockton, 4 M. 106.

Time allowed to contradict answers.

Montgomery vs. Russel, 9 M. 581.

54. Answers Are Evidence—The answers of the party interrogated are evidence, but do not exclude adverse testimony, and shall be weighed by the judge as other testimony.

R. S. 550, 1456; C. P. 268, 274.

Cross interrogatories.

1. Time within which to traverse: Time is not positively fixed in Code, but answers of garnishees must be traversed in twenty days from time of notification of filing by clerk.

Act 27 of E. S. 1877; Act 78 of 1884.

2. Proof necessary for successful traverse.

(a) Oath of two witnesses, or one witness corroborated by strong circumstantial evidence or by written proof.
Hynson vs. Texada, 19 A. 470; *Richardson vs. Terrel*, 4 M. 1; *Bogeois vs. Bourg*, 2 L. 527; *Cox vs. Harding*, 11 L. 354; *Cator vs. Merrill*, 16 A. 187; *Coco vs. Callihan*, 21 A. 625.

(b) Answers establishing title to real estate can not be contradicted except by written evidence.

Mulhaupt vs. Yourec, 35 A. 1052; *Gusman vs. Hearsey*, 26 A. 100; *Stocks vs. Ferguson*, 10 A. 132; *Knox vs. Thompson*, 12 A. 100; *Semere vs. Semere*, 10 A. 704; *Bach vs. Hall*, 3 L. 119; 6 A. 100; 10 R. 466; 4 A. 103.

(B) *Interrogatories to show real nature of transactions as to immovables.*

Under interrogatories on facts and articles, sale absolute and form may be shown to be contract of security.

Crozler vs. Ragan, 38 A. 155; *Newman vs. Shelly*, 36 A. 100; *Hewett vs. Henderson*, 9 R. 879; *Forest vs. Shores*, 11 L. 418; *Succession of Thomas*, 12 R. 215; *Tesson vs. Gusman*, 27 A. 102.

355. Subject of Interrogatories—The party who sues for the recovery of a debt, or the execution of an obligation arising from a written act, may be interrogated as to the reality or simulation of the act.

C. C. 2238, 2275; *Semere vs. Semere*, 10 A. 705; *Forest vs. Shores*, 11 L. 418; *Succession of Thomas*, 12 R. 215; *Hewett vs. Henderson*, 9 R. 879.

356. Interrogatories Indivisible—The party wishing to avail himself of the confessions made by the adverse party in his answer to an interrogatory on facts and articles, must not divide them; they must be taken entire.

C. C. 2291.

(A) *Interrogatories not divisible:*

Godfrey vs. Hall, 4 L. 159; *Bradford's Heirs vs. Brown*, 5 M. 466; *Rogers vs. Parmietl*, 6 M. 555; *Hunter vs. Smith*, 7 M. 418; *Auge vs. Variol*, 81 A. 80; *McLear & Kendall vs. Hunsicker*, 29 A. 540; *Gusman vs. Hearsey*, 26 A. 251.

(B) *Admissions in pleadings may be divided.*

Small vs. Zacharie, 4 R. 144.

(C) *Answers to interrogatories must be regulated by rules of evidence.*

Lafarge vs. Ripley, 4 N. S. 804.

SECTION IX.

Of Issue Joined (Contestatio Litis).

57. Issue Joined—The cause is at issue when the defendant has answered, either by confessing or denying facts set forth in the petition, or by pleading such tory or peremptory exceptions as he is bound to plead *imine litis*, pursuant to the provisions of this Code.

Joining of Issue Essential.

Joining of issue is foundation of action.

Adler, Goldman & Siegel vs. Wolff, 36 A. 175; Heirs of Baillio vs. Prudhomme, 8 N. S. 839.

Plea to merits waives.

Objection to form of action.

Tunnard vs. Hill, 10 A. 247.

No issue is joined.

1. When defendant is sued as president of company and answers personally, or vice versa.

City of Jefferson vs. Kalser, 17 A. 176.

2. When exception is filed.

Borland vs. Judge, 30 A. 156.

Except where exception is virtually an answer, is so regarded and referred to merits.

Mayem vs. Bloomfield & Co., 29 A. 398.

3. When wife files unauthorized answer.

Tillett vs. Upton, 12 A. 146; Adle vs. Auty, 1 A. 280.

Judgment by confession valid without citation or default.

Marbury vs. Pace, 29 A. 557; Skinner vs. Dameron, 5 R. 447.

Curator ad hoc must file answer.

Story vs. Jones, 14 A. 76.

58. Issue Not Joined—When—When the defendant ads some declinatory exception, without answering to merits, there is no issue joined.

359. Joining Issue Foundation of Suit—The joining issue is in fact the foundation of the suit, as citation that of the action; it is only after this is done that the suit begins; the parties are then in a situation to discover what evidence is necessary in support of their respective claims.

(A) Joining issue is foundation of suit.

Zacharie vs. Richards, 6 N. S. 469; *Beatty vs. Wright's Estate*, 7 N. S. 189; *Woolfolk vs. Woolfolk*, 80 A. 189.

(B) Commission to take depositions may issue at any time after service of petition and citation.

Mayo vs. Savory, 4 R. 1.

360. Tacit Joinder by Default—When the defendant suffers judgment by default to be taken against him, the issue is joined tacitly; because such defendant is presumed by his silence to have confessed the justice of the adversary's demand; therefore the plaintiff is allowed to proceed with his proofs, in order to have the judgment confirmed.

C. P. 534.

(A) Judgment by default raises presumption of justice of plaintiff's case.

Lopez vs. Bergel, 7 L. 178.

(B) No amendment of pleadings after judgment.

Landry vs. Baugnon, 17 L. 82.

(C) All essential facts must be proved in confirmation of judgment by default.

C. P. 812; *Young vs. Talbot*, 12 R. 518; *Griffing vs. Caldwell*, 1 R. 16; *Finlayson vs. Martin*, 1 A. 117; *Kentgen & Co. vs. Jordan*, 15 A. 219; *Schewer vs. Knapton*, 15 A. 808.

(D) Default cuts off pleas which should be filed in limine.

Cochrane vs. Miller, 10 A. 140; *Reynolds vs. Reynolds*, 12 L. 618; *Lopez vs. Bergel*, 7 L. 181; *Parish of St. John vs. Schexnaydre*, 84 A. 850.

(E) Answer cuts off motion to dissolve attachment.

Meyers vs. Perry, 1 A. 873.

1. Death of Party After Issue Joined—If after issue is joined either the plaintiff or defendant die, it is not necessary to recommence the action; it continues between the surviving party and the heirs of the one deceased, pursuant to the provisions enacted in the first part of this chapter.

P. 120, 121, 118; C. C. 945, 2315.

Heirs must be cited, not curator ad hoc.

McMicken vs. Smith, 5 N. S. 428.

Making parties:

1. Actions do not abate by death of party.

Stackhouse vs. Zuntz, 41 A. 419; Thomas vs. Cortes, 6 R. 44; Zuberbier & Behan vs. Prudhomme, 84 A. 1049; Todd vs. Young, 16 A. 162; Smith vs. Winbush, 8 L. 442; Augustine vs. Avilla, 29 A. 887; Greig vs. Muggah, 11 L. 358.

2. Minor heirs made parties by tutor, or when there is no regular tutor, by curator *ad hoc* or special tutor.

Id.; 84 A. 1049.

3. And only court where suit pending can appoint curator.

Bussy & Co. vs. Nelson, 80 A. 25.

Proof of death.

Affidavit or other *prima facie* showing necessary.

Hawkins vs. Dartest, 3 A. 547; Babcock vs. Williams, 10 L. 396.

CHAPTER III.

THE INCIDENTAL DEMANDS WHICH MAY BE MADE PENDING THE ACTION.

1. Incidental Demands—The defendant, besides the defenses which he can oppose to the action brought against him, may, on his part, institute demands incidental to the suit, either against the plaintiff or against persons not parties to the cause.

P. 101.

363. *Id. Continued*—The incidental demands which defendant may bring, are demands:

- In compensation;
- In reconvention;
- In warranty.

364. *Intervention and Third Opposition*—Third persons not originally party to the suit, may intervene in the suit, and, like the defendant, institute demands incidental to the main action, either before judgment or on exception, and these demands are called the intervention and opposition of third persons.

C. P. 889.

365. *Incidental Demands in Writing*—The incidental demands must be made in writing in the same manner that the principal demand is made.

SECTION 1.

Of Demands in Compensation, or Set-Off.

366. *Compensation, or Set Off*—Compensation, or set off, is a mode of extinguishing debts, which takes place when it happens that both plaintiff and defendant are indebted to each other; each retaining, in payment of the sum due to him, the amount which he owes to the other.

C. C. 2207 *et seq.*

(A) *In what cases compensation not allowed:*

1. *Against taxes or other public revenues.*

City vs. Sugar Shed Co., 35 A. 548; *Schmidt vs. New Orleans*, 32 A. 459; *Municipality No. 3 vs. Hart*, 6 A. 570; *West Baton Rouge vs. Municipality No. 3*, 27 A. 459; *City vs. Gregg & Ford*, 28 A. 836; *Geren vs. Gruber*, 26 A. 479; *City vs. Waterworks Co.*, 36 A. 486; *Morris vs. Lallaurie*, 39 A. 479; *Union Co. vs. Bordelon*, 7 A. 192.

2. *Against fiduciary debt, or against claim for restitution of thing of which owner has been unjustly deprived.*

Bank vs. Keenan & Slawson, 35 A. 1129; *Haydel vs. Roussell*, 1 A. 35; *vs. Nolan*, 8 A. 449; *Nolan vs. Shaw*, 6 A. 46; *McKee vs. Amonett*, 207; *Rhodes vs. Hooper*, 6 A. 356; *Breed vs. Purvis*, 7 A. 53; *vs. Egerton*, 11 A. 78; *Vincent vs. Gandolfo*, 12 A. 526; *Guilbe Melancon*, 28 A. 629; *Beatty vs. Scuddy*, 10 A. 404; *Murdock & Wilson vs. Bank*, 28 A. 112; *Turley vs. Dreyfus*, 35 A. 518.

Against debt to *insolvent*, though insolvency not judicially declared.

Case vs. Cannon, 23 A. 86, 112; Kennedy vs. Savings Institution, 36 A. 1; Sawyer vs. Hoag, 17 Wall. 610; Pratts vs. His Creditors, 5 R. 288; Crain vs. Baillio, 2 L. 82; 2 A. 459; 6 N. S. 66; 3 N. S. 29; 14 L. 556; 1 N. S. 481.

But where indebtedness of insolvent *preceded* the insolvency, compensation may be pleaded.

Martin vs. His Creditors, 15 A. 165; Boissier's Syndic vs. Belair, 1 N. S. 483; Beatty vs. Scuddy, 10 A. 404.

Between depositor and depositary.

Murdock & Williams, vs. Bank, 23 A. 113; Morgan vs. Lathrop, 12 A. 237; Breed vs. Purvis, 7 A. 53; Bludworth vs. Jacobs, 2 A. 26; Gordon & Gomila vs. Muehler, 34 A. 606; Hancock vs. Bank, 32 A. 590; Bogert vs. Egerton, 11 A. 98; Mathews vs. Creditors, 10 A. 342.

Between officials and the government.

Schmidt vs. New Orleans, 33 A. 17; New Orleans vs. Finnerty, 27 A. 681; New Orleans vs. Fassman, 27 A. 660; U. S. vs. McDaniel, 7 Peters, 16; U. S. vs. Ripley, 7 Peters, 23; U. S. vs. Fillebrown, 7 Peters, 28; U. S. vs. Ringgold, 8 Peters, 163.

Where debts are not equally *liquidated*:

Hope vs. Howard, 19 A. 465; DeLizardi vs. Hardaway, 8 R. 22.

(a) As account against judgment.

Hereford vs. Babin, 14 A. 332; Turley vs. Dreyfus, 35 A. 513.

(b) Unliquidated damages against note.

Berens vs. Ker, 23 A. 96; Pike & Lapeyre vs. Wells, 24 A. 208; Moss vs. Munn & Co., 28 A. 574.

(c) Contingent liability of surety on bond against due bill.

Succession of Arick, 23 A. 612.

(d) Eventual interest of heir in estate against a note.

Maguin vs. Duroc, 22 A. 249.

(e) Account against note.

Phelps vs. Stone, 3 A. 617; Copley vs. Lambeth, 9 R. 137; Hoffman vs. R. R. Co., 9 L. 22.

(f) Unascertained value of property taken for public use pleaded against judgment favor of city.

City vs. Cordeviolle, 10 A. 734.

Where plea is by agent against trust claim.

Hanrahan vs. Leclercq, 15 A. 204; Nolan vs. Rogers, 4 N. S. 145; Hicky vs. Sharpe, 4 L. 337.

Where plea, based on debt due by partnership, is directed against debt due to individual partner.

Key vs. Box, 14 A. 592; Lambeth vs. Vauter, 6 R. 131; Davis vs. Eloi, 4 L. 107; Ashley vs. Sholars, 22 A. 442; Terran vs. DeLastra, 2 L. 325; Walsh vs. Wells, 7 L. 337.

9. Where debt is not equally *demandable*.

As where check-holder pleads its amount in compensation against note sued on.

Case vs. Marchand, 28 A. 60; Case vs. Henderson, 28 A. 69; but see Gordon & Gomila vs. Muchler, 84 A. 604, overruling this case.

10. When consignee pleads debt due him by A in compensation against consignment by A's trustee.

Bell, Trustee, vs. Powell, 28 A. 796.

11. Where plea is by debtor of minors pleading in compensation personal debt of tutor.

Spears vs. Spears, 27 A. 537.

(B) Compensation may be pleaded against execution of judgment when claim offered in compensation was acquired after rendition of judgment.

Middell vs. Gormley, 4 A. 140; Pattison vs. Edmonson, 4 A. 189.

(C) Pleas which may accompany compensation:

Prescription and payment.

Colley vs. Latourette, 7 A. 222; Looney vs. Levy, 85 A. 1010; Durbin vs. Williams, 82 A. 962.

(D) Judgments compensate each other though original obligations were not compensable.

Levy vs. Roos, 82 A. 1029, 1032; Lemane vs. Lemane, 27 A. 694; but see Cock vs. Bank, 82 A. 590.

But judgment suspended by suspensive appeal not pleaded in compensation; *aliter* where appeal is devolutive.

Benton vs. Roberts, 2 A. 248; Kinton vs. Hill, 12 R. 876; Sanders George, 18 A. 537; Woods vs. Viosca, 26 A. 716.

(E) Effect of plea of compensation:

1. Admits debt.

Ashley vs. Sholars, 22 A. 442; 18 L. 6; 12 L. 897.

Unless the admission is negatived by the terms of the plea.

See Davis vs. Stone, 9 A. 126; Looney vs. Levy, 85 A. 1012.

(F) Plea must be special.

Marshall vs. McCrea, 2 A. 79.

(G) And pleaded with clearness and fulness of specification.

Kenner vs. Peck, 2 A. 938; Wilcox vs. Creditors, 11 R. 246; Beaumont vs. Allen, 2 A. 962; Bayly & Pond vs. Stacey, 80 A. 1212; Smith vs. Smith, 8 R. 260; White vs. Moreno, 17 L. 878.

(H) Plea in compensation retroacts to time when plaintiff and defendant became mutually indebted.

Millaudon vs. Lesseps, 17 A. 246; Adams vs. Webster, 25 A. 117.

7. Pleadable at Every Stage of Suit—The defendant may plead compensation, or set-off, at every stage of proceedings, provided it be pleaded specially.

P. 323, 346; *Marshall vs. McCrea*, 2 A. 79.

Payment can not be proved under plea of compensation *et vice versa*.

Maxwell vs. Collier, 6 R. 86.

8. Plea of Compensation Basis for Separate Suit—Compensation may be pleaded, either in the answer to principal demand, or it may be claimed by a distinct separate demand.

May be pleaded on separate answer.

Boagni vs. Anderson, 82 A. 920.

9. Costs Incurred Prior and After Compensation—Adjusted—When the debt which the defendant offers compensation of that which the plaintiff claims, is of a smaller amount than the one demanded, compensation only takes place for that amount, and judgment must be given in favor of the plaintiff for the surplus; the defendant must pay the costs, unless he shows that he has made a full tender of such overplus, at the time and in the manner provided by law.

C. 2204; C. P. 415; *Stewart vs. Harper*, 16 A. 181.

10. Costs Continued—If, on the contrary, the two debts, as to capital and interest, be equal, the judgment shall be given both from their respective obligations, and direct the costs incurred prior to the pleading of compensation to be paid by the defendant, and those incurred subsequently to be borne by the plaintiff.

C. 2208.

11. Costs Continued—But if the debt which the defendant sets off in compensation exceed in amount that which the plaintiff claims, he may pray, in his answer, that judgment be given in his favor for the balance; and if

the compensation be just and equitable, the judgment shall be so rendered.

C. C. 2208.

372. Compensation Claimed in Separate Action—When the defendant opposes compensation, not in his answer, but by instituting a separate demand before the same court in which the suit is pending, the plaintiff shall be bound to answer in the cause, although he may have his domicile out of the jurisdiction of such court; provided the compensation so opposed be not of such nature or amount as to render such court incompetent.

C. P. 162.

373. Id., How Claimed after Judgment in Original Suit—If the defendant suffer judgment in the original suit, without pleading such compensation as he may have to oppose, as provided above, he shall not, on that account, lose his right of action against the plaintiff to recover whatever amount such plaintiff owes to him; but he may bring his action before the court within whose jurisdiction the plaintiff has his domicile.

C. C. 2216.

He can not enjoin execution of judgment; must resort to a separate action.

De Lizardi vs. Hardaway, 8 R. 28; Kennard vs. Henderson, 9 R. 16.

SECTION II.

Of Demands in Reconvention.

374. Reconvention—The demand which the defendant institutes in consequence of that which the plaintiff has brought against him, is termed a demand in reconvention.

R. S. 551, 2888.

(A) *No reconvention by defendant irrespective of residence of plaintiff or close connection of demands, main and reconventional:*

1. When reconventional demand is based on *trespass, tort, breach of fiduciary obligation. Nemo ex delicto suo conditionem suam conditionem facere potest.*

Bank vs. Keenan & Slawson, 35 A. 1129; Forsyth vs. Martin, 3 A. 173; Falls, Howell & Co. vs. Thoms & Powell, 22 A. 173.

On claim for damages incident to the institution of suit for recovery of any civil right.

Harris vs. R. R. Co., 16 A. 140; First Municipality vs. Theatre Co., 2 R. 209; Keene vs. Belf, 11 L. 804; Bank vs. McDonald, 15 L. 26.

On unliquidated claim for damages by lessee informed that house was uninhabitable, it being his duty to repair and deduct from rent.

Diggs vs. Maury, 28 A. 59.

On claim against State.

State vs. Bradley, 87 A. 628; but as against a parish or board of commissioners, see Potts et al. vs. Camp, 12 R. 641.

On abandonment of defendant by plaintiff. Demand for separation from bed and board must be based on proceedings laid down in C. C.

Blvennu vs. Husband, 14 A. 887.

reconventional demand is allowed for damages:

Where suit is sought to be prosecuted by insolvent pending proceedings in insolvency.

Bank vs. Bloch, 44 A. 894.

Where reconventional demand is made for personal judgment for taxes. Such suit is prohibited by Constitution.

Rivers vs. City, 42 A. 1196.

ence of judgment as to reconvention:

Silence in judgment as to reconventional demand equivalent to rejection.

State ex rel. Umbehagen vs. Nepler, 85 A. 865; Shakespeare, Smith & Co. vs. Ware, 88 A. 570.

So also silence in verdict of jury.

Shakespeare, Smith & Co. vs. Ware, 88 A. 571; Edwin's Heirs vs. Bissel, 19 L. 222; Theriot vs. Henderson, 6 A. 222; Villars vs. Faivre, 86 A. 896.

reconvention and rule quæ temporalia, etc.:

When reconventional demand is prescribed, rule *quæ temporalia* will not vitalize it.

Boeto vs. Lane, 8 A. 141; Knox vs. Thompson, 12 A. 116; but see Nicholls vs. Hansec, 2 L. 886.

interrupts prescription pending action:

Riggs vs. Morgan, 10 R. 119.

but prescription runs if reconventional demand not filed.

Solomon vs. Cavellier, 4 A. 187.

(F) Discontinuance pending reconvention :

1. Reconvention pending, no discontinuance allowed so as to affect such demand.

Warfield vs. Hamlet, 28 A. 815; Verges vs. Gonzales, 23 A. 415; Ba vs. Roblohaux, 15 A. 70; Moch vs. Garthwaite, 11 A. 287; McDon vs. Copeland, 9 L. 810; Coxie vs. Downs, 9 R. 188; Davis vs. Y 85 A. 789.

2. But a non-suit may be entered.

McDonough vs. Hart, 3 L. 458; 33 A. 424.

(G) Appealability of reconventional demand.

- Not affected by unappealable nature of main demand.

Coco vs. Guyral, 36 A. 293; Picard & Well vs. Wade, 30 A. 626 579; 11 R. 12; 10 R. 438; 8 R. 387; Pesant vs. Heartt, 22 A. 292; Del Covington, 35 A. 886; Lamorere vs. Avery, 22 A. 1008.

(H) No answer to reconventional demand need be filed nor service be made.

Hobson vs. Woolfolk, 28 A. 885; Bayly & Pond, vs. Stacey & Poland A. 1210.

(I) Reconventional demand must be set forth with clearness and precision.

Teal vs. Lyons, 30 A. 1143; Bayly & Pond vs. Stacey & Poland, 30 A. 1143; 11 R. 12; 10 R. 438; 8 R. 387; Pesant vs. Heartt, 22 A. 292; Del Covington, 35 A. 886; Lamorere vs. Avery, 22 A. 1008. Hershheim & Bro. vs. Levy, 32 A. 840; Frank vs. Hollander, 35 A. 1008; Jonan vs. Ferand, 2 R. 216; 8 R. 364; White vs. Moreno, 17 L. 872; Masters vs. Palmer, 4 A. 331; Lallande vs. Ball, 21 A. 185.

(J) Evidence in reconvention when not objected to will be considered though no formal plea presented.

Kean vs. Brandon, 17 A. 87; Eastran vs. Harris, 4 A. 193; Ames vs. Telegr 5 A. 184; Gayarre vs. Tennard, 9 A. 255.

(K) Reconventional demand being inadmissible, remedy is by motion to strike out or by objecting to evidence.

Harris vs. Stockett, 35 A. 887; State ex rel. Pflug vs. Judge, 35 A. 786.

(L) No amendment of petition allowed which would defeat reconventional demand, as one substituting new plaintiff.

Duncan vs. Helm, 31 A. 808.

375. Reconvention, Except Where Plaintiff Resides in this State or in Different Parish, Must be Necessarily Connected with Main Action—In order to entitle the defendant to institute a demand in reconvention, it is required that such demand, though different from the main action

nevertheless, necessarily connected with and incidental to the same; as, for instance, the demand instituted by the possessor in good faith against him who sues in order to eject him or for the purpose of obtaining the payment of improvements made on the premises:

Provided, that, when the plaintiff resides out of the State, or in the State, but in a different parish from the defendant, said defendant may institute a demand in reconvention against him for any cause, although such demand be not necessarily connected with, or incidental to the main cause of action.

C. P. 374.

When plaintiff resides out of parish, reconventional demand allowed irrespective of nature of demand.

Act 1839; Spears vs. Spears, 27 A. 642; Rigney vs. Monette, 45 A. 941; Spinney vs. Hyde & McKie, 16 A. 250; State ex rel. Pflug vs. Judge, 35 A. 767; State National Bank vs. Evans et al., 32 A. 464; Mayo vs. Savory, 4 R. 1; Woolfolk vs. Ship Graham's Polly, 18 A. 693.

And principal, not agent, is real plaintiff.

Smith vs. Cordage Co., 41 A. 1.

Reconventional demand in such case may be for unliquidated damages.

Lallande vs. Ball, 20 A. 193; Cammack vs. Priestly, 12 R. 423; Evans vs. Hatcher, 10 A. 93; Barrow vs. Robichaux, 15 A. 70; Spinney vs. Hyde & McKie, 16 A. 250; Cain vs. Pullen, 34 A. 511.

Where plaintiff resides in same parish, reconventional demand must be necessarily connected with, or incidental to main demand; otherwise excluded.

Fagot vs. Porche, 7 L. 562; Pl vs. Vidal, 5 A. 303; 13 L. 66; Murphy & Co. vs. McCarthy & Finnerty, 26 A. 33; Hamilton vs. Hurst, 5 A. 150; 15 L. 378; Coco vs. Guyral, 36 A. 293; Wilcoxon vs. Buford, 10 L. 183; Mills vs. Fellows, 30 A. 827, 17 L. 177; Hynson vs. Wheeler, 15 A. 409; Nazum vs. Gore, 24 A. 208; Senecal vs. Smith, 9 R. 418.

And the rule applies where one of the plaintiffs resides in same parish.

Teal vs. Lyons, 30 A. 1140.

(D) By Act 50 of 1886, p. 84, defendant may recover in same damages caused by wrongful issuance of conservatory writs.

Under former jurisprudence, defendant relegated to action bond.

Patin vs. Blaise, 19 L. 297; Ooco vs. Guyral, 26 A. 298; Morgan Driggs, 17 L. 176; Knox vs. Thompson, 12 A. 114; Muzum vs. G. 24 A. 208; Thomas vs. Sewell, 30 A. 360.

(E) No prohibition lies to prevent court from passing on reconventional demand of which it has jurisdiction.

Gullett Gin Manufacturing Co. vs. Judge, 24 A. 760.

376. Where Grounds of Demand Are Entirely Distinct.—If the demand instituted by the defendant be one of its nature independent from the action brought by the plaintiff, it shall be considered as a principal, not a reconventional demand, and must be brought at the domicile of the plaintiff.

377. Form of Reconvention.—In all cases of reconvention, the defendant may plead it either as an exception in his answer to the principal demand, or institute a distinct and separate demand before the court in which the main action is pending; and the original plaintiff shall be bound to answer without pleading to the jurisdiction of the court, even if he has his domicile elsewhere, provided the court be competent.

C. P. 162; Bayne vs. Fox, 5 R. 4.

(A) No citation, no answer, no service of reconventional demand necessary.

Hobson vs. Woolfolk, 23 A. 334; Hunter vs. Spurlock, 3 L. 100; Suarez Duralde, 1 L. 96, 3 N. S. 364; Mead vs. Buckner, 2 L. 283, 12 A. 336; Kohl Wagner, 1 R. 275; Underwood vs. Lacapere, 10 A. 766; Huppenbauer vs. Durlin, 26 A. 540; Erwin vs. Bank, 5 A. 1.

(B) Non-residence can not be pleaded to jurisdiction in cases of reconvention.

Stone vs. Carter, 3 L. 283.

Main and reconventional demand tried together, but sometimes there should be two judgments or findings.

Kelly vs. Caldwell, 4 L. 88; Johnston vs. Bagley, 4 L. 834; Bailey vs. Smith, 12 L. 508; Zeringe vs. Rixner, 14 L. 886.

Reconvention cognizable by court only which has jurisdiction of the action.

Heirs of Kempe vs. Hunt, 4 L. 477; Bayne vs. Fox, 18 L. 80; Biernacki vs. Mexia, 18 L. 86.

SECTION III.

Of Demands in Warranty.

78. Warranty—The obligation which one contracts to bind another in some action which may be instituted against him is termed *warranty*. The one who has contracted this obligation is called the warrantor.

11 A. 302; O. C. 2609, 2617, 2619.

Warranty based on contract, not on offence or quasi offence.

Weymouth vs. Oity, 40 A. 844; Cooe vs. Hardie, 25 A. 280; Hood vs. Stewart, 2 A. 219.

No call in warranty allowed when no privity of contract exists between plaintiff and proposed warrantor.

1. Where defendant sued on note proposes to call third person in warranty who is not on said note.

Butler vs. Stewart, 18 A. 535; Anselm vs. Wilson, 8 L. 87; Hackett vs. Schiele & York, 19 A. 67; see McClue vs. Copley, 1 R. 184.

2. Where drawer of draft is sued and attempts to call in acceptor.

Wesson vs. Garrison & Fuqua, 8 A. 136; Lanusse vs. Massicot, 8 M. 261; Frost vs. Harrison, 8 A. 128.

3. Where action is possessory.

Garrett vs. Oliver, 10 A. 508; Duplessis vs. Lastrapes, 11 R. 451; Thomas vs. Baillio, 7 L. 414.

4. Where process is summary against surety on appeal bond, who attempts to call in one who by separate act agreed to hold him harmless.

McGreck & Co. vs. Murphy & Gains, 28 A. 297.

5. Where railroad calls another when sued on contract to carry goods.

Levy vs. R. R. Co., 85 A. 618; Howrin vs. Clark, 8 R. 27.

(C) Absent warrantor not validly brought into court by curator hoc, no personal judgment can be rendered against him.

Zimmer vs. Thompson, 15 L. 23; Paquet vs. Curtis, 15 A. 451; Laughton Ice Co., 35 A. 1184; Smith vs. McWaters, 7 A. 145.

(D) Wife can never be called in warranty by husband or his representatives.

Wherry vs. Bell, 3 R. 225.

(E) Person called in warranty can not obtain judgment against person calling him.

Jones vs. Hunter, 2 A. 264.

(F) Call in warranty not dilatory exception.

Smith vs. McWaters, 7 A. 145.

379. Kinds of Warranty—Warranty may be of two kinds, real or personal.

Real—Real warranty is that which arises in real hypothecary actions; as when a purchaser is sued in eviction of an immovable property which has been sold to him.

Personal—Personal warranty is that which takes place in personal actions; it arises from the obligations which one has contracted to pay the whole or a part of a debt due by another to a third person.

O'Donnell vs. Henry, Forst & Co., 44 A. 845.

(A) Personal warranty.

Gillman vs. Pillsbury, 16 A. 51; Oliver vs. Bry & Stephens, 7 A. 590; Keane vs. Haber, 12 A. 560; Coward vs. Reynolds, 8 L. 580.

(B) Seller of interest in partnership warrants solvency of debtor in partnership.

Syndics of Morgan vs. Davenport's Heirs, 8 L. 165.

380. When Defendant Entitled to Delay for Calling Warranty—When one is sued in eviction of an immovable property sold to him, or for the payment of a debt which another person had promised to pay on his account to the plaintiff, he shall be entitled to a delay, in order to have his warrantor made a party to the suit, as provided in the following article.

Where previous to judgment of eviction defendant sues warrantor must prove title in some one else.

Emp vs. Kemp, 3 L. 242.

Warrantor performs his warranty by showing want of title in other.

Donough vs. Hart, 8 L. 458.

Warrantor can not attack common title.

Storford vs. Urquhart, 8 L. 335; Stokes vs. Shackelford, 12 L. 172.

Fault must be taken where warrantor has not answered.

Way vs. Bordier, 6 L. 349.

Delay for Call in Warranty—The delay granted the warrantor must be the same as that given to warrantor to answer to the demand instituted against according to the distance of his domicile from the where the court is held in which the main action is pending.

180.

Prayer for Judgment Against Warrantor is Considered Demand in Warranty—The defendant, wishing to call one in warranty, may, in his answer, pray the court to decree against his warrantor the same judgment as may be rendered against him on the principal demand. Such prayer will be considered as a demand in warranty.

Citation to Warrantor—The clerk of the court in which the defendant has, in his answer, called one in warranty must make out a copy of such answer, and issue a writ, both of which shall be served on the warrantor, and shall be allowed for answering the same delay as in ordinary suits; and he shall address the same to the sheriff of the parish in which the warrantor resides, in order that it may be served on him in the same manner as is directed in ordinary suits.

Answer of warrantor need not be served. Party wishing to intervene must do so by petition, not by answer in warranty.

Barker vs. Bank, 20 A. 567.

384. Court in which Main Action Brought has Jurisdiction Over Warrantor, Exceptions and Defences.
 The warrantor thus cited is bound to appear before the court in which the principal demand has been instituted, even when he resides out of its jurisdiction, in order to defend the suit for the defendant; he may plead in exception in defending the cause which the defendant himself might have pleaded, even such as are personal to such defendant..

(A) Defences warrantor may make:

Any defence defeating plaintiffs' claim.

Woolfolk vs. Ship Graham's Polly, 18 A. 698; Burbridge & Co. vs. Drus, 28 A. 554; Powell vs. Hayes, 81 A. 789; Bedford vs. Upton, L. 241.

(B) Pleas of warrantor avail defendant at all times.

Vascoen vs. Smith, 2 A. 528.

(C) He may not object to depositions taken before he became defendant.

Late vs. Armorer, 14 A. 538.

(D) Warrantor necessary party to appeal.

Armant vs. Bourgeois, 19 A. 70.

385. Decree Against Warrantor—Extent—If the defendant is cast in the action, the judge, when he renders judgment against such defendant, must render at the same time a judgment in favor of the defendant against the warrantor, for whatever indemnity may be due to such defendant, as well as for all the loss and damage he has sustained by reason of the action.

Counsel Fees Against Warrantor—When Recoverable by Sheriff, Constable, etc.—But no sheriff, constable or other officer of court, shall have the right to recover costs from a seizing creditor, sued as warrantor, the counsel fees of such sheriff, constable or other officer, incurred by him in suing such creditor in warranty, unless the latter appears within ten days only from service of the call in warranty, fail to appear and make defence for the defendant, who calls him.

Extent of judgment against warrantor:

1. No greater sum than price recovered by him, in absence of damages.

Jeannia vs. Millaudon, 5 R. 76; *Sullivan vs. Goldman*, 19 A. 12; *Municipality No. 1 vs. Leroy*, 15 L. 147; *Municipality No. 1 vs. Cordeville*, 19 L. 235; *Ranney vs. Burthe*, 15 A. 845; *Morris vs. Abat*, 9 L. 564; 18 L. 150; *Fletcher's Heirs vs. Cavellier*, 10 L. 117.

2. Not liable for counsel fees of party calling in warranty.

Williams vs. LeBlanc, 14 A. 770; *Late vs. Armorer*, 14 A. 838.

3. And where there is exclusion of warranty only price can be recovered.

Bach vs. Syndic of Millen, 16 A. 44; *Scott vs. Featherston*, 5 A. 814; *Shantz vs. Stoll*, 84 A. 1287.

4. As to costs—

See *Delacroix vs. Cenas' Heirs*, 8 N. S. 856; *Underwood vs. Lacapere*, 14 A. 274; *Sarpy vs. New Orleans*, 14 A. 811; *Bach vs. Miller*, 16 A. 44.

386. Judgment Executory Against Warrantor—The judgment so rendered shall be executory on the part of the plaintiff against the defendant, and on the part of the defendant against his warrantor.

Plaintiff necessary party to appeal.

Anderson vs. Cade, 10 L. 270.

387. Call in Warranty by Warrantor—If one called in warranty has himself a warrantor who is bound to defend him, he may also in his answer pray that his warrantor be cited to appear to the suit; he shall be entitled, in order to do so, to the same delay granted to the defendant for calling his warrantor; the same rules shall govern, if there be a greater number of warrantors. In such cases the proceedings shall be carried on, and the judgment rendered and executed in the manner provided in the preceding article.

388. Failure to Call in Warranty Does Not Destroy Right of Action—The defendant, though he has not called his warrantor to defend the suit brought against him, does not lose on that account his action in warranty, unless the

warrantor proves that he had means for defeating the action which were not used, owing to the defendant having failed to call him in warranty, or having neglected to advise him of the suit having been brought.

C. C. 2518; C. P. 714.

Independent of call in warranty, defendant has action against warrantor.

Rivas vs. Hunstock, 2 R. 198.

SECTION IV.

Of Intervention or Interpleading.

389. Intervention—An intervention or interpleader is a demand by which a third person requires to be permitted to become a party in a suit between other persons; joining the plaintiff in claiming the same thing, or something connected with it, or by uniting with the defendant in resisting the claims of the plaintiff, or, where his interest requires it, by opposing both.

R. S. 552; C. P. 101, 264.

(A) No intervention allowed:

1. In mandamus proceeding.

State ex rel. Bienvenu vs. Wrotnowski, 17 A. 156; *Chambliss vs. Atchison*, 2 A. 490; but see squarely contra: *Southern Bank vs. Pillsbury*, 81 A. 1.

2. When issues raised by intervenor are entirely foreign to main issue.

Hamlin vs. Board of Liquidation, 80 A. 449; *Pierce vs. Masse*, 77 A. 196; *Adams & Co. vs. Board of Liquidation*, 80 A. 689; but see *Cecil vs. Board of Liquidation*, 80 A. 34.

3. By creditors in suit by heirs to compel administrator to account.

Moreau vs. Moreau, 25 A. 214; *Succession of Thomas*, 12 R. 215; *Brown vs. Atchison*, 2 A. 468.

4. In proceedings *via executiva*.

Chambliss vs. Atchison, 2 A. 488.

Intervention allowed :

1. By State, to defend action brought against Auditor to compel him to warrant, etc.

State ex rel. Solomon & Simpson vs. Graham, 28 A. 408; Burbank vs. Dubuclet, Treasurer, 22 A. 866; Canal and Navigation Co. vs. Tedesco, 87 A. 100.

2. By parish, in suit against parish treasurer to register alleged claims against parish.

State ex rel. Barrow vs. Fisher, 80 A. 514.

No one can be compelled to intervene.

Myers vs. Bigham, 38 A. 1015; LeBlanc vs. Dashiell, 14 L. 274; Hazard vs. Bank, 11 E. 526; Delabigarre vs. 2d Municipality, 8 A. 280; but see Morris vs. Cain, 85 A. 759.

Intervenor can not complain of informalities :

1. Intervenor takes suit as he finds it, and can not complain of informalities between original parties.

Lee vs. Bradlee, 8 M. 55; Hawkins & Roberts vs. Beer, 87 A. 55; West vs. Creditors, 8 E. 123; Emerson vs. Fox, 8 L. 180.

2. He can not object to mode in which writ executed, nor of defective affidavit for sequestration.

Hawkins & Roberts vs. Beer, 87 A. 55; Yeatman vs. Estill, 8 A. 222; Fleming vs. Shields, 21 A. 118; Carroll vs. Bridewell, 27 A. 239; Cordill vs. Succession of McCullough, 20 A. 174; Gilkeson-Sloss Commission Co. vs. Bond & Williams, 44 A. 843.

3. Nor to form of action.

Heirs of Bedell vs. Hayes, 21 A. 643.

But he may show that defendant had disposed of attached property to person from whom he holds.

Shields vs. Perry, McClure & Co., 16 L. 463.

*Defences he may plead :**May plead prescription.*

Canal Bank vs. Beard, 16 A. 846; Dumford vs. Clark's Estate, 8 L. 201.

*Intervention follows main suit.**Intervention follows dismissal of main action.*

Walmsley, Carver & Co. vs. Whitfield, 24 A. 253.

*Failure of intervenor to appeal does not affect other parties.**Failure of intervenor to appeal does not affect right of plaintiff or defendant.*

Myer & Bro. vs. Dupree, 25 A. 216.

(H) Can not substitute himself for defendant.

Intervenor can not, without plaintiff's consent, substitute himself in place of defendant.

Clapp & Co. vs. Phelps & Co., 19 A. 462; Mayer vs. Stahr, 35 A. 59; 77; Cahn vs. Ford, 42 A. 967.

(I) His pleadings:

1. Intervenor's petition may be dismissed for vagueness or other valid exception.

C. P. 172.

As to nature of title, he is on a footing with plaintiff.

Clapp & Co. vs. Phelps & Co., 19 A. 461.

2. He must disclose clearly a cause of action.

Weil vs. Weil, 29 A. 241.

(J) Citation of parties.

Where intervenor claims title to property in contest between plaintiff and defendant, he must cite them both, but when intervenor is third person in whose possession property has been attached, he need cite only seizing creditor as third opposition.

C. P. 598; Gerson vs. Jamar, 30 A. 1294.

(K) Claim for damages in intervention:

Except in case of trespass to real estate, claim for damages can not be made in an intervention against one not residing in the parish.

Gerson vs. Jamar, 30 A. 1294.

(L) Leave to file intervention:

Leave and putting at issue by service necessary.

Bradley vs. Trousdale, 15 A. 206.

(M) Intervenor can not:

1. Object that affidavit is wanting.

Hawkins & Roberts vs. Beer, 37 A. 53.

2. Require security for appearance of lost mortgage note.

Mayer vs. Stahr, 35 A. 57.

3. Object to capacity of plaintiff.

Cordill vs. Succession of McCullough, 20 A. 174; Bedell vs. Carlisle, 30 A. 643; see Field vs. Harrison, 20 A. 411, where intervenor dismissed for want of attachment; but not for informality in original process.

Intervenor can not call in his warrantor nor otherwise delay case.

Devall vs. Boatner, 2 A. 271; Haydel vs. Bateman, 2 A. 755; Colvin vs. Nelson, 4 A. 514.

Intervenor must appeal; else judgement not changed as to him.

White vs. Baptist Church, 81 A. 521; Schlieder vs. Martinez, 88 A. 847; Har-
die & Co. vs. Colvin, 48 A. 851.

No intervention in Supreme Court:

Laloire vs. Wiltz, 81 A. 486.

But query: whether this would hold in cases of original jurisdiction.

See Lazarus vs. McGuirk, 42 A. 194.

Putting intervention at issue:

Where intervention read as part of pleadings and evidence closed, it can not be objected that intervention not put at issue.

Succession of Ball, 42 A. 204.

90. Interest in Suit Justifies Intervention—In order to be entitled to intervene, it is enough to have an interest in the success of either of the parties to the suit, or an interest opposed to both.

O. P. 15; R. S. 553; Webb vs. Keller, 26 A. 596; Succession of Baum, 11 R. 814; Smith vs. Strickland, 19 A. 118; Marigny vs. Nivet, 2 L. 500; Gasquet vs. John, 1 L. 426, 481; Thomas vs. Bienvenu, 85 A. 988; Tutorship of Hackett, 4 R. 290; Jones vs. Jenkins, 9 R. 180.

Objection to intervention must be urged in lower court:

Objection to intervention not heard for first time on appeal.

Herman & Co. vs. Pfister, 2 L. 466.

Intervenor must have an interest:

Where no interest is shown, interventions dismissed.

Canal Bank vs. Beard, 16 A. 846; Brown & Sons vs. Saul et al., 4 N. S. 484; Emerson vs. Fox, 8 L. 188; Jemison vs. Barrow, 24 A. 171.

At what stage of case allowed:

Intervention allowed at any stage of case.

Boyd vs. Heine, 41 A. 398.

Who may intervene:

Subsequent attaching creditors may intervene in first attachment and urge the dissolution of same. *Prima facie* proof of their claim is sufficient.

Claflin Co. vs. Feibleman Co., 44 A. 518.

(E) Intervenor must have actual interest in the suit—not mere stakeholder; but party harassed by conflicting claimants ask court to direct to whom payment can be safely made.

Fortier vs. Slidell, 7 R. 398; Clark vs. Saloy, 2 A. 987; Lizardi vs. Goetz, 1 A. 38; Trustees vs. Dupuy, 31 A. 805; Morris vs. Cain, 35 A. 762.

(F) Proceeding termed intervention for which effect of an intervenor's pleader is concerned is irregular.

Morris vs. Cain's Executors, 34 A. 637; Morris vs. Cain, 35 A. 762.

(G) Rights of intervenor limited to protection of his own interest in the succession.

Succession of Hoover vs. York & Hoover, 30 A. 754.

(H) Intervenor in suit by provisional seizure of stable has caused action when he avers ownership of horses seized with allegation of non-payment of rent to lessee.

King vs. Harper, 33 A. 496.

(I) Bonding by intervenor.

Intervenor may bond.

Act 51 of 1876, p. 92.

(J) This right was denied under former jurisprudence.

Clapp & Co. vs. Phelps & Co., 19 A. 461; Hughes vs. Klingender, 14 A. 1; Letchford vs. Jacobs, 17 A. 81; White vs. Hawkins, 16 A. 25; Beal vs. Anderson, 1 R. 277; Dorr vs. Kershaw, 18 L. 87; 7 R. 349; Burbank vs. Taylor, 23 A. 751; Duperier vs. Flanders, 20 A. 29.

(K) Intervention itself, and application to bond distinct—one may be allowed, other refused.

Letchford vs. Jacobs, 17 A. 79.

(L) Separate appeal by intervenor:

1. Appeal of defendant alone will not bring up intervention.
Hardie & Co. vs. Colvin, 43 A. 851.

2. But if defendant bring up transcript, separate transcript by intervenor not necessary.

Succession of Touzanne, 36 A. 420.

391. Intervention Allowed at Any Time, but Principal Suit Can Not be Retarded—One may intervene either before or after issue has been joined in the cause, provided the intervention do not retard the principal suit; the person intervening must be always ready to plead or exhibit his testimony, because he has always his remedy by a separate action to vindicate his rights.

Intervention must not retard main suit.

Gaines vs. Page, Bacon & Co., 15 A. 106.

But time allowed to cite defendant in intervention.

Perkins vs. Perkins, 20 A. 268; Dubroca vs. Husband, 8 A. 831; Haydel vs. Bateman, 2 A. 755; Taylor vs. Boedieker, 22 A. 79; Andry vs. Andry, 16 L. 268; Sandel vs. Douglas, 25 A. 564.

Application for leave to intervene must be timely:**1. It is timely:**

Even after issue joined.

Taylor vs. Boedieker, 22 A. 79; Boyd vs. Heine, 41 A. 898.

2. It is not timely:

(a) After judgment.

Thompson vs. Mylne, 4 A. 212; Dubroca vs. Husband, 8 A. 831.

(b) On day of the trial.

Smith vs. Strickland, 19 A. 118.

(c) After trial is commenced.

Fearing & Co. vs. Ball's Executor, 6 L. 690.

There may be cases in which intervenor entitled to a continuance, for service of papers on opposite parties.

Sandel vs. Douglas, 25 A. 564; 20 A. 258; Silbernagel vs. Silbernagel, 82 A. 766; Myers vs. Brigham, 88 A. 1015; 8 A. 831; 16 L. 265.

Intervenor must take notice of orders rendered in open court.

Thompson vs. Mylne, 4 A. 206; Bludworth vs. Jacobs, 2 A. 24; Dunbar vs. Ballard, 2 A. 821.

92. Forum in Which to Intervene—The plaintiff in intervention must institute his demand before the court in which the principal action has been brought; being considered as plaintiff, he must follow the jurisdiction of the defendant.

What court intervention filed:

Intervention must be before same court in which main action is brought, whose jurisdiction not affected thereby.

Kenner vs. Holliday, 19 L. 184; Fox vs. Bayne, 5 R. 2; Flood vs. Shamburgh, 8 N. S. 622; Duncan vs. Duncan, 14 L. 556; Succession of Hoover vs. York & Hoover, 80 A. 752; Leman vs. Truxillo, 82 A. 77; West vs. His Creditors, 8 R. 128; Cordill vs. McCullough, 20 A. 174; Heirs of Bedell vs. Hayes, 21 A. 643; Carroll vs. Bridewell, 27 A. 289.

93. Petition of Intervention—The intervention must be formed by a petition addressed to the court before

which the principal demand has been brought; it must set forth the grounds on which the cause is supported.

Service of—This petition must be served on the party against whom it is directed, in order that he may answer the same in the delay given in ordinary suits.

(A) Service of intervention:

When intervention not put at issue by proper service on party against whom directed, no evidence thereunder heard.

Chism & Boyd vs. Ong, 88 A. 702; *Weil vs. Weil*, 28 A. 241; 16 L. 265; 831; 82 A. 765; *Yale & Co. vs. Hooper*, 12 A. 460; *Aleix vs. Derbig*, 22 A. 886; *Cain vs. Pullin*, 34 A. 511.

(B) Intervention by petition:

Intervention must be by petition, not mandamus, to call warranty.

Barker vs. Bank, 20 A. 568.

(C) Joining issue on intervention—Waiver:

Objection that intervention is not at issue is waived by going to trial on merits without objection.

Succession of Ball, 42 A. 204; *McCoy vs. Sanson*, 18 A. 456.

(D) Joint answer by defendants in intervention:

Where intervention directed against plaintiff and defendants they may join in answer.

Thomas vs. Bienvenu, 85 A. 387.

394. Petition to Intervene Must be Allowed—Costs
The judge can not refuse to admit an intervention; but must pronounce on its merits at the same time that he decides the principal action; if the demand be not sustained the person intervening shall be decreed to pay the incidental costs.

R. S. 496.

(A) Silence of judgment as to intervention equivalent to rejection
Shakespeare, Smith & Co. vs. Ware, 88 A. 570.

(B) Judge can pass upon intervention only at time of deciding main action.

Dubroca vs. Husband, 8 A. 831.

(C) Dismissal of main action works dismissal of intervention.

Walmsley, Carver & Co. vs. Whitfield, 24 A. 258; Barron vs. Jacobs, 88 A. 870; McMillan vs. Gibson, 10 L. 517; Merritt, Bliss & Co. vs. Openheim, 9 A. 54; Jones vs. Lawrence, 4 A. 278.

(D) Intervention seasonably tendered should not be refused.

Ikerd vs. Postlewaite, 36 A. 237.

(E) Appeal lies from order of dismissal of intervention.

Ikerd vs. Postlewaite, 36 A. 237; Schlieder vs. Martinez, 38 A. 849.

SECTION V.

Of the Opposition of Third Persons.

395. Third Opposition to Arrest or Regulate Seizure or Judgment—This opposition is a demand brought by a third person not originally a party in the suit, for the purpose of arresting the execution of an order of seizure or judgment rendered in such suit, or to regulate the effect of such seizure in what relates to him.

C. P. 298.

(A) No oath required to file third opposition claiming proceeds.

Rains vs. Chaffe & Bro., 28 A. 657.

(B) Rule against purchaser under order of seizure and sale to show cause why proceeds should not be paid to plaintiff in rule is substantially third opposition.

State ex rel. Bagur vs. Judge, 24 A. 599.

But party can not allow his property to be sold under judicial process and then claim proceeds on ground that he did not owe debt.

Weedon vs. Landreaux, 26 A. 729.

(C) Objections third opponents can make and sustain:

1. That attaching creditor is not entitled to privilege, the attachment having improvidently and illegally issued.

Converse, Kennett & Co. vs. Steamer Lucy Robinson, 15 A. 423;
Buckner vs. Gordy, 28 A. 536.

2. Simulation of plaintiff's claim.

Herber vs. Thompson, 46 A.

(D) Objections third opponent can not urge and sustain:**1. Informalities in original process.**

Harper vs. Commercial Bank, 15 A. 126; Gilkeson-Sloss Commercial Co. vs. Bond & Williams, 44 A. —; Fleming & Baldwin vs. Shick, 11 A. 118; Lee vs. Bradlee, 8 M. 55.

2. Want of authority of agent to execute notes and mortgage sued on.

Theurer vs. Knorr, 24 A. 597.

3. Mode of execution of attachment.

Yeatman vs. Estill, 18 A. 222; Romagosa vs. Del Nodal, 12 A. 841.

4. Nullity of sale, the proceeds of which third opponent claims.

Tarleton, Whitney & Tullis vs. Kennedy, 21 A. 500; Boubede vs. Boudreau, 29 A. 274; Peychaud vs. Citizens' Bank, 21 A. 262; Slocumb vs. Williams, 28 A. 245; Provosty vs. Carmouche, 22 A. 185; Livaudais vs. Livaudais, 8 A. 455; Ouliber vs. Creditors, 16 A. 287; Blessey, H. Brothers et als. vs. Kearny, 24 A. 289.

(E) Right to file opposition:

Right to file third opposition is absolute and not to be refused when legally demanded.

Bowman vs. McElroy & Bradford, 15 A. 663; Vidal vs. Insurance Co., 5 R. 68; Fulton vs. Fulton, 7 R. 78.

(F) Opposition after release of seizure:

Opposition must be filed pending the seizure, not after release.

Payne, Dameron & Co. vs. Eaton & Barstow, 27 A. 160.

(G) All grounds for opposition must be pleaded in one opposition:

Bowman vs. McElroy, 15 A. 663.

(H) Appeal:

Appeal lies from judgment on third opposition and mandamus to enforce it.

State ex rel. Bagur vs. Judge, 24 A. 599.

(I) When opponent's claim is prescribed:

Third opponent's claim being prescribed, opposition is dismissed.

Slocumb vs. Williams, 28 A. 245.

(J) Test of jurisdiction.

Flash, Lewis & Co. vs. Schwabacher, 52 A. 856.

(K) Bonding—effect on third opposition:

Bonding of seized property does not work dismissal of opposition.

Cass & Dowling vs. Rouark, 25 A. 353.

Aliter, it would seem, in cases of intervention in sequestration proceeding.

Carroll & Co. vs. Bridewell, 27 A. 289.

(L) No ex parte rejection of third opposition:

1. Third opposition once granted should not be set aside *ex parte*.

Rareshide vs. Enterprise Ginning Co., 42 A. 1195.

2. Remedy is by proper exceptions.

Ikerd vs. Postlewaite, 86 A. 236; *Sandel vs. Douglas*, 25 A. 564; *Bowman vs. McElroy*, 15 A. 663.

(M) Remedy of seizing creditor when there are apparent liens:

Seizing creditor may rule apparent lien holders or privilege creditors to come in and show cause why incumbrances should not be erased.

Larhet vs. Hogan, 1 A. 380; but see *Young vs. Municipality No. 1*, 15 A. 787.

(N) Sale of property pending opposition aiming to prevent it, and which is subsequently sustained, is null.

Ludelling vs. Graves, 8 A. 597.

(O) Bonding of third opponent and plaintiff in injunction:

Bonding allowed by Act 109 of 1880, within ten days of the filing of the petition, etc.

(P) Sheriff mere stakeholder:

Opposition directed against plaintiff, not sheriff, who is mere stakeholder.

Staples vs. Boulligny, 10 R. 424; *Gerson vs. Jamar*, 80 A. 1294; *Converse, Kennett & Co. vs. Hill*, 14 A. 89; *LeBœuf vs. Merle*, 1 A. 144.

(Q) Waiver of opposition.

Oppositions not tried in lower court are abandoned.

Baron vs. Cage, 22 A. 574.

396. Third Opposition to Claim Ownership of, or Privilege on, Thing Seized—Such opposition may take place in two cases:

1. When the third person making the opposition pretends to be the owner of a thing which has been seized.

2. When he contends that he has a privilege on the proceeds of the thing seized and sold.

(A) Causes recited in C. P. 396 are exclusive.

Livaudais vs. Livaudais, 8 A. 454; Boubede vs. Aymes, 29 A. 275; Skillman vs. Purnell, 8 L. 495; Wafer vs. Pratt, 1 R. 41; Brown vs. Couget, 8 R. 14; Tiner & Conrey vs. Steamer, 5 A. 756.

(B) Third opponent may intervene before judgment and claim ownership.

Schmidt & Zeigler vs. Williston, 27 A. 815; Bach vs. Verbois, 19 A. 163; Hickman vs. Thompson, 26 A. 260; Robinson vs. Haynes, 19 A. 133; Woolfolk vs. Woolfolk, 30 A. 146; Cator vs. Morrill, 16 A. 187; Penn vs. Ott, 12 A. 235.

(C) Fact of ownership sole issue when opposition made under Par. 1.

Harper vs. Railroad Bank, 15 A. 136.

(D) Opposition virtually petitory action—When:

Third opponent is plaintiff in petitory action under Par. 1.
Wafer vs. Pratt, 1 R. 42.

(E) Oppositions by privilege creditors:

Third opposition allowed at instance of privilege creditor.

(a) Such as pledgee.

Horner vs. Denis, 34 A. 890.

(b) Creditor with privilege resulting from prior seizure.

Sheldon vs. Bank, 11 R. 181.

(c) All mortgage creditors.

Vanhette vs. Husband, 5 R. 496; Gill vs. Husband, 10 R. 26; Fishman vs. Gordey, 2 A. 763; Antognini vs. Bailey, 11 A. 275; Wallis vs. Boure, 14 A. 104; White vs. Blanchard, 19 A. 63; James vs. Breaux, 26 A. 265; Hickman vs. Thompson, 26 A. 260; Etheridge vs. Milling, 15 A. 513.

(F) Specific allegations of opposition:

Third opposition sufficiently specific when it states nature of privilege, of transaction, amount of debt and particular property on which privilege rests.

Goode vs. Nelson, 29 A. 143.

(G) When privilege claimed, proper remedy is by third opposition not by intervention.

Yale & Co. vs. Hooper, 12 A. 460.

397. Forum for Third Opposition—This opposition must be made before the court which has granted the order of seizure or the judgment in virtue of which the provisional seizure has been effected.

C. P. 154, 804; *Pouts vs. Bistes*, 15 A. 636.

(A) Opposition must be filed before court seizing.

Quertler & Co. vs. Hille, 21 A. 429; *Berard vs. Young*, 26 A. 596; *Adams vs. Daunis*, 29 A. 820; *Buckner vs. Wisdom*, 81 A. 82; *Ins. Co. vs. DeBlanc*, 81 A. 108; *Lobdell vs. Bank*, 8 A. 117.

(B) Exceptions:

But there are exceptions, *ex necessitate*, to this rule, as where process from court in one parish is executed in another parish.

Hagan vs. Hart, 6 R. 428; *Terry vs. Terry*, 10 L. 77; *McDonough vs. Doyle*, 9 R. 802; *Lawes vs. Chinn*, 4 N. S. 890; *Osborn vs. Judge*, 35 A. 589; *Coleman vs. Brown*, 16 A. 110; *Hobgood vs. Brown*, 2 A. 823; *Galbraith vs. Snyder*, 2 A. 492; *Police Jury vs. Michel*, 4 A. 84; *Copely vs. Edwards*, 5 A. 644.

(C) Injunction or opposition in State court to Federal seizure:

Where seizure is by Federal court, opposition or injunction issues from it—not from State court.

Brooks vs. Montgomery, 23 A. 450; *Freeman vs. Howe*, 24 How. 453.

398. Third Opposition Against Seizure of Property Not Belonging to Defendant—If the opposition has for its object to set aside the order of seizure, as having been effected on property not belonging to the party against whom the order was directed, but owned on the contrary by the third person making the opposition, it must be done by means of a petition, which, together with a citation, must be served on the party making the seizure, as in ordinary suits; but such opposition shall be considered as a separate demand, distinct from the suit in which the order was granted.

C. P. 895.

(A) Amendment to C. P. 398:

Act 46 of 1886, p. 65, amends and re-enacts Art. 398 so as to add thereto the following: "Provided, that in all cases where personal property is seized upon meane or final pro-

cess, and is claimed by a third opponent, the seizing creditor may be allowed in his answer to the third opposition to allege and prove his title fraudulent, and the court shall try and decide the issue thus made."

See *Lahitte vs. Frere*, 42 A. 869, 870.

Former jurisprudence allowed seizure only in case of a violation.

Austin, Thorpe & Co. vs. DaRocha, 23 A. 46.

(B) Service essential:

Service of opposition on the seizing creditor is essential.

Chaffe & Sons vs. Sheriff et al., 37 A. 185.

399. Injunction Against Sale Under Third Opposition—The court may, nevertheless, at the request of a third opponent, enjoin the sheriff not to proceed to the sale of the property thus claimed; provided, such third person give security to the plaintiff for such an amount as the court shall determine, to be responsible for all damages which said plaintiff may sustain, should the opposition be wrongfully made.

C. P. 800, 400.

Injunction and bond:

Injunction with security necessary to stay sale.

Jones vs. Lawrence, 4 A. 290; *Gill vs. Gill*, 10 R. 28.

400. Liability of Sheriff where Sale not Enjoined
Right to Demand Indemnity Bond—If the third person who has intervened in the suit, has not enjoined the sale of the property of which he claims the ownership, or has failed to furnish the surety required, his opposition shall not prevent the sheriff from selling the property under seizure; but in such case the sheriff shall be personally responsible for all damages which said sale may occasion to the intervening party; and the sheriff shall have his recourse against the party who has obtained the order of seizure. If the opposition be sustained, the sale made by the sheriff shall be null; provided, that in all such cases the sh

iff may require of the plaintiff an indemnity bond, with sufficient securities, as provided by special laws.

See Act 37 of 1882, p. 49, amending Sec. 3579 R. S., and requiring third opponent to make affidavit of ownership and set forth fully facts on which title is based; C. C. 2453; C. P. 314; *Smith vs. Creditors*, 21 A. 244; 21 A. 431.

(A) Liability of sheriff:

1. He and seizing creditor liable *in solido* for selling property of third person after notice.

Benner & Banlett vs. Michelet, 28 An. 439; *Duperron vs. Van Wickle*, 4 R. 39; *Lobdell vs. Union Bank*, 8 A. 119.

2. But not liable for paying over to seizing creditor when judgment is in his favor.

Etheridge vs. Milling, 15 A. 518.

3. Sheriff bound to know at his peril that property seized belongs to defendant.

Macias vs. Lorio, 41 A. 300.

4. It is sheriff's duty to require affidavit under Act 37 of 1882. *Id.*

(B) Bond of indemnity by sheriff:

No bond should be asked by sheriff simply because he fears claim of some third person

Dunlap vs. Freret, 10 A. 88; *Lacey vs. Butler*, 8 N. S. 684.

(C) No claim for damages—when:

Claim for damages forfeited where person stands by and countenances sale of his property.

Berens vs. Well, 30 A. 185; *Beach vs. McDonough*, 5 R. 352; but see *Duperron vs. Van Wickle*, 4 R. 39.

(D) Person whose property is seized is not bound to notify sheriff or demand indemnity bond.

Macias vs. Lorio, 41 A. 300.

401. Third Opposition Claiming Privilege is Made by Motion—Sheriff holds Proceeds—If, on the contrary, the opposition be made on the ground that the third opponent has a privilege which entitles him to be paid in preference to the party making the seizure out of the proceeds of the sale of the property seized, as when there are several seizures or conflicting claims on the same

property, such opposition may be made by motion which due notice must be given both to the party who made the seizure and to the sheriff; and the court, without requiring any security from the third opponent, shall direct the sheriff to retain in his hands, subject to the further order, the proceeds of the sale.

C. P. 800 *et seq.*, 838, 722; *Vanhille vs. Husband*, 5 R. 496; *Willis vs. W*, 7 R. 87.

(A) *Prior judgment against defendant not necessary before proceeding against plaintiff and sheriff.*

Wagner vs. Newman, 18 A. 508.

(B) *Defendant need not even be made party.*

Converse, Kennett & Co. vs. Hill, 14 A. 89; *Lebœuf vs. Merle*, 1 A. 144.

(C) *Proceeding is by motion or rule.*

Wagner vs. Newman, 18 A. 511.

(D) *Sheriff may call in conflicting claimants.*

Lebœuf vs. Merle, 1 An. 144; 7 R. 898.

(E) *So also may purchaser.*

Morris vs. Cain's Executor, 34 A. 657.

(E) *Order directing sheriff to retain proceeds preserves privilege of landlord.*

Clty vs. Vaught, 12 A. 839; *Robb vs. Wagner*, 5 A. 112.

(F) *Third opponent can not claim proceeds and attack sale.*

Masse vs. Brady, 41 A. 557; *Ins. Co. vs. DeBlanc*, 31 A. 100; *Hobbs vs. Thompson*, 46 A.

(G) *Third opposition admits seizure.*

Asher vs. Fredenstein, 19 A. 268.

402. Order of Payment of Third Opponent and Seized Creditor—If the third person has either a privilege of a higher class than that of the party who has made the seizure, or a special hypothecation duly registered anterior to that of such party; in such case, the third opponent shall be paid for the amount of his claim, together with the interest and costs, and the plaintiff in the cause shall be entitled only to receive the surplus, if there be any.

C. P. 801, 401, 722.

403. Where Third Opponent has General Mortgage—

If, on the contrary, the third person intervening has only a general or legal hypothecation on the property seized, the plaintiff in the original suit shall be paid in preference, if he prove that the defendant has other property of sufficient value to satisfy the claim of the third opponent; in such case, the third person intervening shall be condemned to pay the costs.

O. P. 301, 401, 706; *Deneufbourg vs. Didion, Romer et als*, 7 A. 344.

CHAPTER IV.

OF THE PROCEEDINGS AFTER ISSUE JOINED UNTIL JUDGMENT BE GIVEN.

SECTION I.

Of Real Tender.

404. Real Tender—When the defendant confesses that he owes the whole or a part either of the debt or of the property demanded of him, and the plaintiff refuses to receive what such defendant acknowledges that he owes him, such defendant may make a real tender of the same to such plaintiff, either after the issue has been joined or even previous to any judicial proceeding having been instituted against him.

O. P. 417; O. C. 2167.

(A) *Tender is admission of liability pro tanto.*

Ins. Co. vs. Pike et als., 34 A. 323.

1. And bars subsequent plea of prescription.

Whitworth vs. Ferguson, 18 A. 602; *Dupre vs. Lumkin*, 23 A. 534; *Davis vs. Millaudon*, 17 A. 104.

2. But otherwise where thing demanded is not tendered, but something else, with special denial of the claim or thing demanded.

Davis vs. Millaudon, 17 A. 97.

(B) Tender of thing is no admission of value.

McMaster & Hyde vs. Brander, 15 L. 207.

(C) Judgment may be rendered at once, on motion for amount dered, leaving case on trial for balance.

Small vs. Zacharie, 4 R. 144; Parsons vs. Suarez, 9 L. 412.

(D) When tender as condition precedent to suit is not necessary.

See Drouet vs. Lacroix, 28 A. 126; Gallagher vs. Abadie, 26 A. 818.

Not necessary from opponent in meantime.

Fazende & Seixas, praying, etc., 85 A. 1147; 8 L. 252.

(E) When tender is necessary.

Heirs of Castle vs. Floyd, 48 A. 587; Coulson vs. Wells, 21 A. 886; 9 L. 313; 8 L. 213; 8 L. 177; 8 L. 544; 8 L. 440; 21 A. 426; 28 A. 354; Brown vs. Boun A. 174; Farquhar vs. Iles, 89 A. 874; Barrett vs. Emerson, 8 A. 503; Stoc vs. Dounay, 6 A. 591; Basso vs. Benker, 38 A. 432; Kellogg vs. Durald A. 234; 19 A. 508; 28 A. 424; 24 A. 534; 25 A. 814, 879; Paul vs. Hoss, 28 A. Barelli vs. Gauche, 24 A. 524.

405. Tender of Money and Tender of Thing—It is necessary to distinguish such real tenders which are made for a debt for money due, from those which have for their object the obligation of delivering a thing certain and specific, or a quantity of any particular thing, or immovable property.

C. C. 2167.

Manner and mode of tender must be specially alleged.

Conrad vs. Burbank, 24 A. 18; Small vs. Zacharie, 4 R. 144.

406. Place of Tender—A real tender must be made at the place agreed upon for the payment; or if there be no special agreement as to the place of payment, it must be made either to the creditor himself, or at his dwelling, or at the domicile chosen for the execution of the agreement.

C. C. 2168.

Where money deposited at bank agreed upon as place of payment, loss borne by creditor should bank fail.

McCullope vs. Fluker, 12 A. 551; Catalonge vs. Alva, 13 A. 99; Ste vs. Forman, 12 A. 671.

407. Tender of Money—Formalities—When the tender is for money due, it must be made to the creditor himself.

or at his actual or chosen domicile, by the debtor or by his agent, in the presence of two witnesses residing in the place, by tendering to such creditor the sum which is due to him, with the interest and such costs as he may have incurred, and exhibiting such sum to him in the presence of such witnesses, in the current money of the United States.

The same formalities must be observed in making a tender of anything due and consisting of things certain which the debtor can easily carry about with him.

O. C. 2167; O. P. 418.

(A) Peremptory refusal dispenses with the production of money in the presence of witnesses.

McStea & Value vs. Warren & Crawford, 26 A. 458; Patterson & Bonner, 14 L. 214; Wilbor & McGillcuddy, 8 L. 886; Alter vs. Shepherd, 27 A. 207; Fernandez vs. Silva, 1 L. 278.

(B) Money deposited or tendered must be given to creditor or placed where he can control it; he must have power to obtain it.

Succession of O'Keefe, 12 A. 247; DeGoer vs. Kellar, 2 A. 496; Benton vs. Roberts, 2 A. 244.

(C) Offer must be in presence of two witnesses.

Thiel vs. Conrad, 21 A. 214; 6 L. 19; 4 E. 146; 2 A. 441, 496; 14 A. 827.

(D) Forms must be strictly followed.

Thompson vs. Edwards, 23 A. 188; Mechanics and Traders' Bank vs. Barnett, 27 A. 179.

(E) Tender must be followed by consignment.

Walker vs. Brown, 12 A. 266; Benton vs. Roberts, 2 A. 243; Breen vs. Schmidt, 6 A. 17.

But when creditor refuses, consignment affects only question of risk.

Alter vs. Shepard, 27 A. 207.

(F) Tender or deposit with notary other than one designated to draw act is not sufficient.

Short vs. Knight, 15 L. 483.

1. Nor even with notary designated.

Monrose vs. Brocard, 20 A. 78.

2. Payment in court not sufficient.

DeGoer vs. Kellar, 2 A. 496; Alexander vs. Saloy, 14 A. 827.

408. Notice of Intended Tender—When Necessary.

If the debt be for a specific thing or for a quantity of kind of movable property which can not be easily transported, or which are to be delivered at a place designated in the contract or necessarily indicated by the nature of the obligation, the debtor must give previous notice in writing to the creditor, that on such day and hour he will be at the place where the things to be tendered are deposited, in order there to make a delivery of the same to him.

C. C. 2167.

Time and place must be specifically designated.

Smith vs. Richardson, 11 R. 520.

409. Manner of Tender—After such notice, the debtor or his agent must, on the day and at the hour appointed, be present at the place where the property to be delivered is deposited; and there, in the presence of two witnesses residing in the place, make a real tender of the same to the creditor by showing them, if he be present, designating them to him, and by offering to deliver the same to him immediately.

C. C. 2167.

410. Tender of Real Property or Credits—If the object of the obligation on the part of the debtor be real property, a debt, or some other personal right which the debtor has promised to sell, transfer or convey to the creditor, the debtor must previously give written notice to the creditor to be and appear on a certain day, and at a fixed hour at the office of some public notary or of some officer exercising similar functions, or at such other place as he may designate, in order there to receive the sale, cession, transfer or conveyance, which he is ready to make to him, either of real estate, debt or personal right which he had contracted to transfer to such creditor.

When the debt to be transferred consists in bank stock, the tender of the same must be made at the bank whose stock is to be transferred.

See *Robbins vs. Martin*, 43 A. 491.

411. Id., Manner of Tender—After due notice having been given, the debtor must appear, either in person or by his agent, at the place designated pursuant to the provision of the preceding article, and there, in the presence of two witnesses residing in the place, offer to the creditor, if he appear, to execute in his favor, in due form, either the sale, conveyance, or transfer which he had contracted to execute.

O. C. 2167.

412. Deposit at Charge and Risk of Creditor—If the creditor refuse to accept the real tender thus made to him, or do not attend on the day, hour, and at the place designated to him by the debtor, to receive the delivery of the property contracted to be sold, conveyed or transferred, as prescribed in the preceding articles, the debtor will have the option either to retain such property in his possession until the creditor demands the same judicially, or to deposit it at the charge and risk of such creditor.

413. Places of Deposit—Written Notice—Creditor Bound for Expenses—If the debtor determine to deposit the property, it must be deposited, if it consists in specie, in some of the banks of the State, or in some of their branches; if in goods, merchandise, or some other personal property, the same must be deposited in some store, warehouse, or other safe place, for the account of the creditor.

The debtor must apprise the creditor, by a written notice, of his having placed the property in deposit and of the manner of his having effected the same; he shall be bound to give to the preservation of the property depos-

ited the same attention as he would give to that of his own property.

The creditor shall be bound to reimburse all the expenses which he shall incur on account of the deposit, if the tender is decreed to have been properly made.

C. O. 2167; C. P. 407.

414. After Valid Tender and Deposit, Thing is at Disposal of Creditor—After depositing the property as above prescribed, should it perish, be spoiled, or its value diminished, without any fault on the part of the debtor, the creditor shall be on the account of the creditor, if the tender is adjudged valid.

C. O. 2167.

415. Costs and Expenses After Valid Tender—In the trial of a cause, it appears that previous to the institution of the suit having been instituted the defendant had made a valid tender, in the form above prescribed, of the sum or value of the property demanded, the plaintiff shall be decreed to pay all the expenses incurred for the preservation of the property, if the same has been deposited, and shall recover only the sum or thing tendered to him, and interest only as had accrued previous to bringing the action.

C. O. 2167; C. P. 860.

(A) Interest only to judicial demand allowed in case of valid tender.
McStee & Value vs. Warren & Crawford, 26 A. 463.

(B) Mere announcement of willingness to pay is not real tender.
Bacon vs. Smith, 2 A. 442; 6 L. 17.

(C) Formalities must be strictly pursued.
Mudd vs. Stilles' Heirs, 6 L. 17.

(D) Real tender saves costs.
Rowlett vs. Shepherd, 4 L. 96.

416. Costs Prior to Tender Paid by Defendant—If the real tender has been made since the institution

suit by the plaintiff, though the property has been placed in deposit as above prescribed, the defendant shall, nevertheless, although the tender be declared valid, be condemned to pay the costs and expenses which have been incurred up to the date of such real tender; and the plaintiff shall be bound to pay only such costs as have arisen since his refusal to accept such real tender.

C. C. 2167.

417. Tender at Any Stage of Suit—Real tenders may be made at every stage of the suit, previous to the definitive judgment.

C. C. 2067; C. P. 404.

But this does not apply where plaintiff must make tender as condition precedent.

Farquhar vs. Iles, 89 A. 876.

418. Repeal of All Provisions except as Contained Herein and in Civil Code—All the other rules relative to real tender provided by the Civil Code, not re-enacted in this section, and which are not contrary to the provisions above expressed, must be observed; but all the provisions of the other statutes relating to the same subject are hereby repealed.

C. C. 2167, 2168.

SECTION II.

Of the Amendments which may be made to the Petition or to the Answer, of the Consolidation of Causes, and of Commissions for Examining Witnesses.

419. Amendments of Petition After Issue—After issue joined, the plaintiff may, with the leave of the court, amend his original petition; provided the amendment does not alter the substance of his demand by making it different from the one originally brought.

R. S. 468; C. P. 421.

(A) When amendments should be allowed:

1. When ground does not conflict with former pleading, is only cumulative.

Giraud vs. Mader, 18 A. 147; *Terrell vs. Boardman*, 84 A. 808; *J. vs. Hunter*, 2 A. 264; *Richardson vs. Fenner*, 10 A. 599; *Smith vs. Harrell*, 16 A. 190; *Holmes vs. Chieftan*, 1 A. 186; *Mader vs. 15 L. 182*.

2. When plaintiff sues as a corporation and plea of null corporation sustained, he should be allowed to insert name of real parties plaintiff.

Congregation of Mt. Carmel Church vs. Farrelly, 84 A. 534.

3. When agent suing in his own name desires to disclose principal.

Board of Liquidators of Hart & Hebert vs. Huguet, 88 A. 264.

4. When plaintiff originally sues as liquidating partner, subsequently acquires individually the asset. He may amend even after except on.

Payne vs. Furlow, 29 A. 160; *Lackcock vs. City*, 85 A. 481; *Womack vs. Womack*, 2 A. 534.

But no amendment when exception of no cause of action or any peremptory exception, sustained.

Raymond vs. Palmer, 85 A. 280; *Burbank vs. Harris*, 82 A. 84; *Hart vs. Bowie*, 84 A. 528; *Ursuline Nuns vs. Dupassau*, 7 A. 645; *McCubbin vs. Hastings*, 27 A. 718, overruled.

5. When amended petition merely supplies omissions, general allegations and corrects clerical errors and procedural errors as in original petition.

Payne vs. Railroad and Steamship Co., 88 A. 165.

6. When supplemental petition or answer merely amplifies original, does not retard suit, and does not affect basis of suit.

Southern Bank vs. Pillsbury, 81 A. 9; *Meyer vs. Farmer*, 86 A. 78.

7. When plaintiff desires to correct allegation of date of notes sued on.

Bussey & Co. vs. Rothchild, 27 A. 816.

8. In all cases where no injury will be done thereby to other party not taken by surprise.

Jelks vs. Smith, 5 A. 674; *Haydel vs. Bateman*, 2 A. 755; *Estlin vs. Ryder*, 20 A. 252.

9. To allege a subsequent promise to pay.

Ledoux vs. Buhler, 21 A. 180.

10. To correct petition by alleging residence of plaintiff or correct name of defendant or other matters of form.

Psyche vs. Paradol, 6 L. 880; *Thomas vs. Baillio*, 7 L. 418; *Segur vs. Sorel*, 11 L. 441; *Brewster vs. Saul*, 8 L. 298; *Lallande vs. Terrill*, 12 L. 7.

11. To allege appearance of legal representative.

Woodman vs. Richardson, 15 A. 508; *Janata vs. Macera*, 20 A. 426.

12. To change action from possessory to petitory.

Hoover vs. Richards, 1 R. 34.

13. To allege value of property and its location, in a partition suit.

Fix vs. Koepke, 44 A. 745.

(B) No amendment allowed.

1. Pending trial, changing issues, and delaying suit.

Sevin & Gourdain vs. Caillouet, 80 A. 531; *Landry vs. Gamet*, 1 R. 862; *Stilley vs. Stilley*, 20 A. 53; *Beard vs. Call*, 4 R. 466; *Barrow vs. Bank*, 2 A. 453; *Morrison vs. Keller*, 10 A. 542; *Petitpain vs. Frey*, 15 L. 196; *Oakey vs. Murphy*, 1 A. 372.

2. When such amendment changes issues.

Guilbeau vs. Thibodeau, 80 A. 1099; *Menefree vs. Johnson*, 2 R. 274; *Angamar vs. Ins. Co.*, 10 A. 178.

- (a) As where amendment alleges failure or want of consideration after general issue.

Boagni vs. Anderson, 32 A. 920; *Stilley vs. Stilley*, 20 A. 55; *Bemiss vs. Dwight*, 8 A. 337; *Calvert vs. Tunstall*, 2 L. 207; *Babcock vs. Shirley*, 11 L. 74; *Avegno vs. Fosdick*, 23 A. 109.

- (b) Or alleges merger of note sued on into judgment.

Oakey vs. Murphy, 1 A. 372; *Denniston vs. Payne*, 7 A. 333.

3. Where case is called for trial.

Spyker vs. Hart, 22 A. 584; *Case, Receiver, vs. Watson*, 22 A. 350; *Graviers vs. Cullion*, 11 L. 271; *Sevin & Gourdain vs. Caillouet*, 80 A. 531; *Duval vs. Kellam*, 1 R. 58; *Cohn & Bruen vs. Levy*, 14 A. 355; *Lynch vs. Crain*, 2 A. 905; *Dabbs vs. Hempken*, 3 R. 123; *Kyle vs. Van Bibber*, 7 A. 576; but see 1 M. 175.

4. Where facts sought to be alleged were known and could have been alleged in former answer.

Lynch vs. Crain, 2 A. 905.

5. Where object is to substitute another name for that of plaintiff.

Caracel vs. Coulon, 2 M. 143; *Succession of Delassize*, 8 R. 259; *Duncan vs. Helm*, 21 A. 303; *Jones vs. Jenkins* 9 P. 180.

6. Where exception of no cause is sustained.

Hart vs. Bowie, 34 A. 325; *National Bank vs. Moss*, 41 A. 232; *Abadie vs. Berges*, 41 A. 281.

7. To cure fatal defect in injunction.

Rhodes vs. Union Bank, 7 R. 63; *Bagley vs. Tate*, 10 R. 45.

(C) At what time allowed:

Before and after issue joined.

Merrill vs. Lattimore, 12 R. 183; Gasquet vs. Johnson, 1 L. 433;
len vs. Jewell, 3 A. 189; Succession of Rouzan, 7 R. 436.

(D) Matter of discretion.

Benoit vs. Hebert, 1 L. 212; Spencer vs. Conrad, 9 R. 79; McCub
Hastings, 27 A. 715.

(E) Leave of court or consent necessary.

Tullos vs. Lane, 45 A. 333; Baines vs. Higgins, 2 L. 220; Trahan vs. Mc
2 L. 210; Callaway vs. Webster, 1 R. 533; Rhodes vs. Schofield, 6

When once filed, amendment can not be ruled out *ex p
motu*.

Heirs vs. Corcoran, 15 A. 694.

(F) Affidavit—when required:

In amendment in matters of injunction.

Maillet vs. Martin, 15 A. 40; Calderwood vs. Trent, 9 R. 227.

(G) Answer to amendment:

Must be made immediately unless time is asked and gra

Woodman vs. Richardson & McFee, 15 A. 508; Estlin vs. Ryde
252; Merrill vs. Lattimore, 12 R. 183.

(H) Service of amendment:

1. When not necessary.

Chaffe & Bro. vs. Thornton, 28 A. 837; 3 M. 336; Flynn vs. Fly
A. 163.

2. When necessary.

Loquet's Heirs vs. Pierce, 5 L. 361.

420. Amendment of Answer—The defendant may amend his answer, subject to the same rules, and add it new exceptions; provided they be not of the dilatory kind. After answering on the merits, dilatory exceptions shall not be raised by way of amendment, unless with the consent of the plaintiff.

C. P. 421; Farrell vs. Austin, 3 A. 627; Easton vs. Dugat, 4 L. 898.

(A) Intervenor may amend provided suit is not delayed.

Gillis vs. Carter, 29 A. 698; Succession of Baum, 11 R. 814.

defendant can not amend after evidence has been concluded.

United States vs. Bank of U.S., 11 R. 418.

after judgment.

James vs. Richard, 8 L. 487; 17 L. 82.

amendment allowed pleading extinguishment of debt by other

s.

vs. Metoyer, 1 A. 264; Debuys vs. Mollere, 2 N. S. 625; Lallande vs. Correll, 12 L. 8.

dilatory exception allowed after answer.

cretion in allowing amendment not lightly disturbed.

ker vs. Lillies, 4 L. 298; Penny vs. Parham, 1 A. 278.

egations of amended answer or petition must be proved;

filing amounts to nothing.

vier vs. Perilliat, 4 L. 208.

when plaintiff alleges new matters of substance to meet excep-

f no cause, he must pay costs up to filing amendment.

reaud vs. Delassize, 18 L. 418.

material amendments will not affect judgment.

vs. Gordon, 14 L. 418.

Answer to Amended Petition—When one of the parties has amended either his petition or his answer, the other party has the right of answering the amendment; but the answer must be done immediately, unless the amendment is of such nature as to induce the court to grant further time for answering the same.

s. 468.

a new suit; no right to delay unless granted, and no delay

when amendment is of form only.

edman vs. Richardson & McFee, 15 A. 508.

t where amendment contains matters of substance, default

be taken in absence of answer.

wn vs. Brown, 21 A. 461; Allain vs. Preston, 2 L. 392; 4 L. 18; Knight vs.

aight, 12 A. 80; Caldwell vs. Fales, 2 L. 180; Hughes vs. Hamson, 8

S. 638.

ended answer not changing issue allowed.

pton vs. Bank, 41 A. 719; Young vs. Gay, 41 A. 758.

422. Consolidation of Causes—When the parties instituted against each other several suits, either as principal or incidental demands, before the same tribunal, the court may, at the request of one of the parties, order that the same be consolidated, if from their nature they may be compensated, in order that they may be adjudicated by one single judgment.

C. P. 146.

(A) Consolidated suits form but one and each party must be heard from judgment in consolidated case.

Vasocu vs. Woodward, 35 A. 535.

(B) Depositions in prior suit between same parties on same facts receivable in evidence.

Cannon vs. White, 16 A. 85; Clossman vs. Barbaney, 7 R. 438.

423. When Consolidation Ordered—Consolidation of suits may be ordered, whenever a demand in warranty has been instituted before the same court separately from the main action, provided the two suits are ready for trial at the same time.

424. Commission to Take Depositions—When the plaintiff or the defendant has witnesses who he wishes to be heard in support of his claims, he must apply for the testimony of such witnesses to be taken in writing, which may be read in evidence on the trial of the cause, pursuant to the rules of the respective courts.

C. P. 430, 439, 467, 464; R. S. 468, 512, 607, 613, 621; 42 A. 59.

(A) When taken:

At any time after the service of citation.

Mayor vs. Savory, 4 R. 1.

(B) Crossing interrogatories without names and residence of witnesses waives defect.

Denton vs. Murdock, 5 R. 127.

(C) Party not bound to execute commission.

Trustees, etc., vs. Lee, 4 L. 229.

Nor take evidence of all witnesses.

Bramstein & Bendor vs. Crescent Ins. Co., 24 A. 589.

strict forms prescribed by Arts. 425, 426, 427, 428 C. P. not allowed where party was present by counsel at taking of depositions.

Succession of Segond, 2 A. 188.

Testimony of plaintiff or defendant may be taken under commis-

ion.
Lear & Kendall vs. Succession of Hunsicker, 52 A. 1225.

Interrogatories to certain named witnesses "and others," duly used, are admissible.

Madras & Co. vs. Steamer Webster, 11 A. 208.

That cause is summary will not prevent issuing of commissions.

McDell vs. Elghtor, 4 R. 59.

Objections made must be passed upon before reception in evidence.

Perret vs. Bonvillain, 52 A. 29.

Order for commission by clerk. Issuing of commission equivalent to order.

Ferriber vs. Latting, 9 A. 169; Cannon vs. White, 16 A. 88.

g. Commission to Obtain Depositions of Witnesses of Parish—If the witness, whom either the plaintiff or defendant wish to be heard reside out of the parish in which the suit is pending, such plaintiff or defendant may be entitled to obtain from the court a commission, directed to some judge or justice of the peace of the parish where such witness resides, or to any other person authorized by law to administer oaths, to take his deposition.

S. 555, 556, 807, 809, 618, 614, 8969, 8970; C. P. 780; Balne vs Wilson, 18 L. 60.

Issuing commission by judge is order for commission to issue.

Madford vs. Cooper, 1 A. 525; Cannon vs. White, 16 A. 88; Ferriber vs. Latting, 9 A. 169.

Notice of time and place of taking depositions.

Need not be given when opportunity to cross interrogatories allowed.

McSquet vs. Johnson, 1 L. 425.

426. Manner of Obtaining Commission—Service on Counsel—The party wishing to take the deposition of a witness pursuant to the provision of the preceding article must annex to the commission which he has obtained for that effect, written interrogatories, containing the questions to be put to the witness; such interrogatories, previous to being sent, must be submitted to the adverse party (who may add to the same whatever questions he wishes), and served on him or his counsel, three days previous to having them forwarded, in all cases where they are required by law to be submitted.

R. S. 556, 606, 607, 610, 8971.

Service on counsel or party permitted; no notification necessary.

Hallock vs. Caruthers, 5 R. 190.

427. Id. Service on Party Opposite—If the adverse party is not represented by an advocate on record, and defend himself his cause, or suffer a judgment by default to go against him, the party on whose motion the commission has been granted, must cause the interrogatories intended to be put to the witness to be notified to the adverse party, in order that he may add, within three days, such party reside at the place where the court is sitting, whatever interrogatories he wishes to put to the witness on his part.

R. S. 607.

428. When Notice of Place and Time for Examination Unnecessary—If the adverse party, having no advocate as above expressed, reside in the parish where the deposition is to be taken, it shall not be necessary for the judge or justice of the peace, to whom the commission is directed to give, before examining the witness, written notice to such a party, of the place and day when the deposition of the said witness shall be taken, saving to both parties

er of them the right of being present, if they think
er, to the taking of the said deposition, but without
permitted to add any further questions to those con-
in the aforesaid interrogatories, except with the
nt of the other party.

s. 607, 610, 611, 614; C. P. 484, 488; *Underwood vs. Lacapere*, 10 A. 766.

**Service by Posting in Court When Party is Ab-
and Unrepresented**—But when the adverse party, hav-
o advocate on record resides neither at the place
the court is held, nor in the parish where the depo-
is to be taken, the mode of giving notice to such
shall be by delivering to the clerk of the court a
of the interrogatories, to be by him stuck up in his

lies in all Cases of Notice to Such Parties—This
shall govern in all cases where written notice is re-
to be given to a party in a suit who has no advocate
ord, and who does not reside at the place where
urt before which the cause is pending is held.

Depositions of Witnesses, Old, Infirm or About to
t—When the witness, whom either the plaintiff or
lant wishes to examine, resides in the parish where
use is pending, but is old, infirm, or about to depart
he State, so that the party having need of his testi-
fears that he may be deprived of the advantage he
s to derive from the same, such party may, on mo-
btain, even before issue joined in the suit, by swear-
the facts on which he relies in support of his appli-
a commission from the court, directing the depo-
of such witness to be taken by any judge or justice
peace of the place, after having given notice either
adverse party or to his advocate, as above provided.
onable time must be given to enable such party or
vocate to attend at the examination.

In this case, it is not required that the party who obtained a commission to examine witnesses should communicate the written interrogatories to the adverse party or to his advocate.

Testimony May Always be Taken Out of Court. Parties in all cases, except criminal and civil jury cases, may take testimony of witnesses out of court, who reside in the parish where the cause is pending, on compliance with the laws providing the manner of so doing.

R. S. 614, 615; C. P. 424, 188, 496, 440, 467, 924.

Taking testimony of physicians living more than ten miles from court house.

Act 108 of E. S. 1877, p. 177.

431. Compulsory Attendance of Witnesses Under Commission.—The judge or justice of the peace, to whom commissions for taking testimony are directed, may cause such witnesses to be summoned to appear before him, for the purpose of giving their testimony; such judge or justice of the peace may compel the attendance of such witnesses, if they refuse to appear, in the same manner as in causes pending before him.

C. P. 186.

432. Oath of Witness—Reducing Depositions to Writing.—When witnesses thus summoned appear, the judge or justice to whom the commission has been directed shall swear each of them to declare the truth of the questions put to them in the cause; they shall reduce to writing their answers of such witnesses to the interrogatories and questions to the commission or to the questions put to them by the parties or their advocates, if the same be present, in all cases where it is not necessary that such questions be put in writing.

C. P. 186.

(A) It need not appear who wrote down depositions.

Ferriber vs. Latting, 9 A. 169; Blair vs. Collins, 15 A. 683.

(B) Nor that answers were read to witness.

Morrison vs. White, 16 A. 100.

(C) Where commission to take testimony in another State is directed to a particular commissioner, his official quality need not be proved.

Harrison vs. Bowen, 16 L. 284; Shipman & Ayers vs. Haynes, 17 L. 504;
Morrison vs. White, 16 A. 100; Gordon vs. Nelson, 16 L. 522.

(D) Such commissioners are State officers and seals and signatures are recognized.

Dwight vs. Splane, 11 R. 487.

(E) When not specifically named, commissioner's capacity must be proved.

Barelli vs. Lyttle, 4 A. 557; Thatcher vs. Goff, 18 L. 351.

(F) Capacity, how proved.

Barfield vs. Hewlett, 4 L. 119; Edmondson vs. R. R. Co., 18 L. 238; Yeatman vs. Erwin, 5 L. 265.

(G) Witness himself or even third persons not interested may write down answers.

Bastian vs. Christian, 34 A. 884; Dwight vs. Splane, 11 R. 487; Bank vs. Lamothe, 6 R. 5; Beale and Wife vs. Brandt and Wife, 7 L. 585; 7 N. S. 521;
Imboden vs. Richardson, 15 A. 584; Blair vs. Collins, 15 A. 603.

(H) Party or counsel can not draw up answers.

Bank vs. Lamothe, 6 R. 5.

(I) Witness may sign at end of process verbal.

Bastian vs. Christesen, 34 A. 884.

(J) Deposition not properly authenticated may be withdrawn and returned for that purpose.

Calmes vs. Stone, 7 A. 183.

(K) Process verbal need not under pain of nullity immediately follow examination of witnesses.

Lee's Heirs vs. Burke, 10 L. 587.

(L) Joint examination of witnesses permitted.

Clark vs. Clark, 14 L. 270.

(M) Officer executing commission must sign process verbal.

Price vs. Emerson, 16 A. 95.

433. Mode of Execution of Commission—Return Clerk—After the depositions have been taken as above directed, the judge or justice of the peace before whom they have been taken must cause the same to be signed by the witness, or in case such witness can not sign, have his mark affixed to the same in his presence. He shall then draw a *verbal process* of the taking of such deposition, annex the same to the commission and interrogatories, if there be any; the whole must be inclosed, sealed, and directed to the clerk of the court.

R. S. 607, 558, 611, 612, 621, 622.

(A) *Deposition need not be fastened to commission. Sufficiently inclosed with same.*

Parker vs. Brashear & Barr, 16 L. 69.

(B) *Language of process verbal immaterial; if substantially correct, it is sufficient.*

Tollett vs. Jones, 8 R. 275.

434. When Notice Necessary, It Must Be Proved—The party on whose application such depositions have been taken, must, before he can use the same as evidence in the cause, show that the adverse party has been served with written notice of the time and place designated for taking such depositions, as well as with a copy of the interrogatories intended to be put to the witnesses, in all cases where such notice is required pursuant to the provisions above enacted.

R. S. 615; C. P. 426; see Smelser vs. Williams, 4 R. 158.

Notice need not be given when opportunity given to cross-interrogatories.

Gasquet vs. Johnson, 1 L. 425.

435. When Notice Not Required—But such notice shall not be required, if the judge or justice by whom the depositions have been taken certify that he himself notified the adverse party of the time and place fixed for taking such depositions before him.

R. S. 559, 605, 613, 8978; C. P. 138, 439, 467.

436. Commission for Non-Resident Witness—When the witness, intended to be examined, lives out of the State, shall be sufficient for the party, wishing to take his testimony, to apply for the same to any judge having jurisdiction of the cause, and swear to the materiality of the testimony.

O. P. 138, 439, 467; *State ex rel. Leche vs. Wagner*, 42 A. 59.

) Affidavit necessary if not waived by crossing.

Lee vs. Lee, 1 A. 318; *Folse vs. Kittridge*, 15 A. 222.

) No continuance on account of non-return of commission when ample time is had.

Kirkland vs. Harris, 20 A. 153.

) But when parish is distant and time short, continuance allowed.

Kimball vs. Dunn, 12 L. 446; *Tarleton vs. Bringler & Co.*, 15 A. 419.

437. To Whom Commission Directed—Commissions to examine witnesses out of the State may be directed to any judge, justice of the peace, magistrate, or other person residing at the place where such witnesses live, or any commissioner appointed by the Governor of the State.

R. S. 598, 1449.

438. Interrogatories Accompany Commission—Such commissions must be accompanied with the interrogatories, after the same have been duly communicated or notified to the adverse party or his advocate. If the adverse party reside at the place where the depositions are to be taken, such party must be notified of the same in the manner provided relative to taking the depositions of witnesses residing in the State.

O. P. 428; R. S. 598, 611.

439. Return Day—Commission Issues After Citation—
Rule to Receive Depositions—In all cases where the courts grant commissions for taking testimony either out of the State or in another parish, they must fix a term for

returning the same. In doing this, they must take consideration the distance and the existing mode of communication; provided, that commissions to take testimony may issue at any time after the service of petition citation; and whenever a commission to take testimony shall have been returned, the party intending to use depositions, taken under the same, may, on filing same in the clerk's office, file a notice or take a rule which must be served on the opposite party or his counsel to show cause why the same should not be used as evidence in the case; whereupon the party, on whom the rule is taken, shall be bound to urge any objections, if he have, to the admission in evidence of said depositions founded on any irregularity in the execution of said commission, and if he fail so to do before the cause is called up to trial on its merits, all such objections shall be considered as waived; provided, that no objections to deposition, except such as are founded on irregularity in executing the commission, shall be decided on in such rule.

C. P. 188, 424, 486, 467; R. S. 512, 554, 598, 618, 8969.

(A) Making of rule absolute cures defects of form, such as:

1. That alleged sick witness was really able to attend.
Groves vs. Steel, 2 A. 481.
2. That witness was incompetent to testify.
Goldenbow vs. Wright, 18 L. 872.
3. That all cross-interrogatories were not answered.
Anderson vs. Dinn, 17 L. 170.

(B) Objections must be specific.

Ins. Co. vs. Edmondson, 5 L. 800.

(C) Objections to questions must be made before commission awarded.

Winn vs. Twogood, 9 L. 422.

(D) Where excluded depositions will not affect the cause, judgment not disturbed and cause not remanded.

Eastman vs. Railway Co., 35 A. 1022.

) *Excluded depositions must be identified with bill of exceptions.*
 U. S. vs. 837 Cases of Wine, 1 Woods, 48; Leftwitch vs. Lecan, 4 Wall. 187.

) *Return day. Evidence taken after return day not extended are not admissible.*

Wiggins vs. Guler, 12 A. 177; Follain vs. Lefevre, 8 R. 18.

) *But commission not null because no return day is fixed.*
 Id.

) *Where defects are pointed out not due to fault of party, new commission issues and continuance allowed.*

Tarleton vs. Bringier, 15 A. 419.

440. Depositions Taken for Use in Suit Apprehended, but not Actually Brought—If one state under oath, in a petition to a competent court, that he has reason to apprehend that a person named in the said petition intends to institute a suit against him for a cause of action therein set forth; and that he fears that, previous to the institution of such suit, a witness, whose evidence is necessary to his defence, may die or depart; in such case, the court may direct the testimony of such witness to be taken, either before them or before any judge or justice of the peace from whom they may appoint for that purpose, after written notice having been duly served on the adverse party, or, if absent, by posting it up in the clerk's office, and the testimony so taken shall be evidence on the trial, should the witness examined be dead or absent.

C. P. 188, 480, 467.

SECTION III.

Of Experts, Auditors of Accounts and Judicial Arbitrators.

441. Experts—Persons versed in the knowledge either of a science, an art, or a profession, selected in order to give their opinion on some point or question on which the decision of a cause depends, are termed *experts*.

1. Experienced railroad man may give opinion as to whether it is necessary to build a bridge, or on other matters connected with their business.

Hamilton vs. Railroad Co., 84 A. 972.

2. Experts to examine signature.

Benfield vs. Hewlett, 9 M., 41.

442. When Experts will be Appointed—Experts may be appointed whenever the court deem them necessary in order to obtain information, or at the request of parties to the suit.

1. Court may appoint experts *ex proprio motu*, and appoint expert matter of discretion.

Cameron vs. Lane, 86 A. 716; O'Donnell vs. Henry, Forrest & Co., 86 A. 845.

2. But not to consider matters of pleading, which is business of judge.

State ex rel. Attorney General vs. Lazarus, 89 A. 142.

3. Experts must not act on information derived from circumstances of case.

LeCarpentier vs. Delery's Exr. 2 M. 213.

443. Auditors for Investigation of Intricate Accounts
In causes which require the investigation of long and intricate accounts, the court may appoint auditors to examine such accounts, and who shall state the same in their report to the court.

1. Long and intricate accounts, requiring minute and critical investigation, should be submitted to auditors, and cases will be remanded for that purpose.

Hayes vs. Rhodes, 86 A. 851; Breen vs. Downey, 84 A. 1217; Sprague vs. White's Exr., 4 N. S. 298; Bird vs. Black, 5 A. 192; McConnell vs. Pasley, 81 A. 582; Board of Commissioners vs. Eiddell, 86 A. 1184; Keough vs. Foreman, 88 A. 1484.

2. Reference is pure matter of discretion.

Guinault vs. LeCarpentier, 19 L. 240; Caulker vs. Banks, 8 N. S. 532.

3. Appointment of liquidator matter of discretion.

Pratt vs. McHatton, 11 A. 260.

4. *Ex parte* appointment of liquidator of firm illegal.

Wainsley & Patterson vs. Mendelsohn & Newman, 81 A. 152.

5. Liquidator may be appointed in vacation.

City vs. Gauthreaux, 82 A. 1126.

14. Judicial Arbitrators to Decide Pending Suit—
 When both parties to a suit pray that their dispute may
 be submitted to the decision of judicial arbitrators, to
 be mutually appointed by such parties, the judge shall
 direct the cause to be referred to such arbitrators as the
 parties have selected to decide between them, either as
 arbitrators or as *amicable compounders*, according as the
 parties may have determined in their submission; which
 submission must be fully spread on the records of the
 court, as the rule which must govern the arbitrators in
 rendering their award.

R. S. 2881, 2882; Thompson & Co. vs. Moulton, 28 A. 587; C. C. 8089, 8109; C. P.
 459, 460, 461.

1. Award of arbitrators is not consent judgment.

Dunn vs. Pipes, 20 A. 277.

2. May be annulled for fraud or usurpation.

Canty vs. Beal, 17 L. 285.

3. But where they act as amicable compounders their de-
 cisions are final.

Davis vs. Leeds, 7 L. 476; Hopkins vs. La. Western R. R. Co., 38 A. 1188,
 Hunt vs. Zuntz, 28 A. 500; 18 A. 87; Bird vs. Lacook, 7 A. 171; Cobb vs.
 Parham, 4 A. 148; Donovan vs. Owen & Ihmsen, 10 A. 463.

But not where they go beyond their authority or power.

In re Wallace, etc., 31 A. 535.

4. Is not this article unconstitutional as prescribing a mode
 of trying cases not authorized by constitution.

See State vs. Judge, 9 A. 62; Hayes vs. Hayes, 10 A. 642; Gagnet vs.
 City, 28 A. 207.

5. Appeal from award of arbitrators.

Janes vs. Richard, 2 L. 311.

6. Reference to arbitrators will not authorize dismissal of
 suit.

Flower vs. O'Connor, 7 L. 199.

7. Case is still before court.

Fielding vs. Westermeyer, 20 A. 51.

8. Submission to arbitrators must be in writing.

Baxter vs. Sisters of Charity, 15 A. 696.

445. Reference to Arbitrators Must be at Request of Both Parties—The court can not, *ex officio*, or at the request of only one of the parties, refer a cause to the decision of arbitrators, without the consent of the other party.

446. Appointment of Arbitrators and Umpire—When either experts, auditors of accounts, or judicial arbitrators are to be appointed, each party shall name one, and a third shall be appointed by the court to act as umpire in case the two should not agree.

If the parties, or either of them, neglect or refuse to name a point, the judge shall name all three.

If there be several plaintiffs or defendants, or other parties in the cause, all the parties having the same interest shall name together one expert, auditor, or arbitrator, in the case may be.

C. C. 8109, 8117, *et seq.*; C. P. 825.

***Ex parte* appointment of experts null.**

Roper *vs.* Magee, 10 A. 61.

447. Where One Expert, etc., Alone is Chosen—The parties may agree that only one expert, auditor, or arbitrator, shall be appointed in the cause; and if they agree to their choice, the court shall appoint the person mutually designated by them, or in case they can not agree in their choice, nominate one *ex officio*.

448. Notice of Appointment—Oath—Report—Experts—Auditors, or judicial arbitrators, so nominated, must be notified of their appointment by either of the parties, who shall deliver to them a copy of the order of the court. They must, at the request of such party, take an oath before any judge or justice of the peace, to perform faithfully their functions; this oath must be taken in writing, at the foot of the copy of the order of the court. It must be

to the report which such experts or auditors shall
in the case, or to the award which such arbitrators
render.

C. 8111.

Report not homologated of experts not shown to have been
sworn may be contradicted by other evidence.

Mooney vs. Cage, 6 R. 494.

Oath first requisite.

Mooney vs. Cage, 6 R. 494; Locke vs. Dakin, 15 L. 424; Donovan vs.
Owen, 10 A. 463.

Swearing to report is not such oath.

Penny vs. Carl, 10 A. 202.

Oath may be taken after reduction of report to writing.

Nott vs. Daunoy, 7 M. 1.

. Refusal of Experts, Auditors, etc., to Serve—Per-
appointed as experts, auditors, or arbitrators, if they
e to act as such, must immediately notify their re-
to the court, in order that their place may be filled
other appointment, at the request of either parties.

**. No Resignation After Oath and Acceptance, Ex-
With Permission—**After experts, auditors, or judi-
rbitrators have accepted their nomination, and taken
ath as above provided, they shall not be allowed to
their appointment, without adducing for so doing
cause as will be satisfactory to the court.

Notice to Parties of Commencement of Proceedings—
the documents in the cause have been placed in
hands, they shall, at the request of either of the
s, give to the adverse party, at least three days pre-
notice of the time and place at which they intend to
ence their proceedings, in order that such party
attend.

C. 8112.

Arbitrators must appoint time and place and give notice.

Penny vs. Carl, 10 A. 202; Hunt vs. Zunts, 28 A. 502; Dreyfus vs. Hart,
86 A. 982; Locke vs. Dakin, 15 L. 424.

2. But experts not compelled to proceed contradictorily need not notify parties.

Cameron vs. Lane, 86 A. 716.

3. Prior to taking oath arbitrators can refuse to serve.

Lallande vs. Bonny, 7 L. 292; *Id.*, 13 L. 462.

451. Summons for Witnesses—The party wishing to produce witnesses before the experts, auditors, or arbitrators, appointed as above prescribed, shall obtain summons to that effect from the clerk of the court where the suit is pending; and if any witness thus summoned refuses to obey the summons, he may be punished by the court on motion of the party complaining of his disobedience in the same manner as if he had refused to appear when summoned to attend at the trial of a suit.

C. C. 8115; C. P. 185.

452. Neglect of Experts, Auditors, etc., to Act—If experts, auditors, or judicial arbitrators, having accepted the functions delegated to them by the court, fail to execute their mandate within the delay prescribed by the order of the court nominating them, or within the further delay which the court may grant in case it has been found impossible to conclude the business within the first delay, the court may sentence them to pay all costs which their neglect may have occasioned, and to make good damage as the parties may have sustained from the suit.

C. C. 8106, 8123, 8124, 2315.

453. Report—As soon as the experts, auditors or accountants, or judicial arbitrators have accomplished their mandate, they must draw their report, or award, as the case may be, and direct the same to the clerk of the court who nominated them, in order that either of the parties may have the same homologated.

454. Signature of Report—Such reports or awards must be signed by the experts, auditors, or arbitrators named.

and if any one of them refuse to sign, that circumstance must be stated at the foot of the report or award.

C. C. 8128.

455. Report Must Be Precise and Clear—Auditors of accounts must make their report by establishing the respective accounts of the parties with sufficient precision and minuteness to enable the court to judge whether they acted properly in rejecting or in allowing the articles in the accounts.

1. Auditors should state details.

McMickin vs. Fleklin's Curator, 11 L. 814; Harrison vs. Faulk, 16 L. 858.

2. But award of arbitrators need not state facts on which grounded.

Breaux vs. Martin, 5 L. 460.

3. Report must be signed before returned into court.

Harrison vs. Faulk, 16 L. 858.

4. After report, auditors are *functi officio*.

Harrison vs. Faulk, 16 L. 858.

456. Rule to Homologate Report—After the experts, auditors, or arbitrators, have sent their report or award to the clerk of the court by which they were appointed, the party wishing to avail himself of the same, may, on motion, call upon the adverse party to show cause, within ten days after the notice of such motion shall have been served on him, why such report or award should not be homologated.

C. C. 8128.

457. Opposition to Homologation—The adverse party, after being thus notified, may, within ten days, oppose the homologation, by delivering to the clerk a written statement of the grounds on which his opposition rests. The court shall decide summarily on their merits.

1. All grounds of opposition should be stated in one opposition.

Harrison vs. Faulk, 16 L. 858.

2. Trial of opposition summary and must precede trial jury.

Flower vs. Downs, 12 R. 101; *Thomason vs. Waters*, 3 L. 73.

3. Only such facts as are put at issue by opposition can tried, and judge can not refuse to hear evidence.

Thompson vs. Farrent, 12 A. 183.

4. Ten days' notice before homologation is allowed.

Thomason vs. Waters, 3 L. 73.

5. The homologated report not receivable in evidence.

McNair vs. Gourlier, 40 A. 353.

458. Report of Experts Not Conclusive on Court—The court is not bound to follow the opinion of the experts in their decision. It may correct any error in the reports of the auditors of accounts, or it may, if it deem necessary, order another report to be made by the experts, or another examination of accounts by the auditors.
C. P. 442.

1. Estimates and opinions of experts not binding on court jury.

Succession of Ducloux, 11 A. 406; *Czarnowski vs. Zeyer*, 35 A. 799; *Bal vs. Nolan*, 6 R. 508; *Tourne vs. Rivierre*, 1 A. 330; *Merleult vs. Aust*, 3 M. 310; *Millaudon vs. Percy*, 5 N. S. 555; *Mooney vs. Cage*, 6 R. 4.

2. Party may disregard report of experts and prove up claim.
McCarthy vs. Zacharie, 11 A. 474.

3. All grounds of opposition to report of auditors should stated at once; successive oppositions irregular.

Harrison vs. Faulk, 16 L. 333.

4. Unhomologated report not read in evidence.

Reynolds vs. Bowley, 2 A. 692; *McNair vs. Gourlier*, 40 A. 353.

5. Direct action of nullity necessary where award is once acquiesced in.

Peniston vs. Somers, 15 A. 679.

459. Award of Arbitrators Not Conclusive—As regards the award of arbitrators, the court may rectify the errors they contain, even though the parties had agreed that such award should be made the judgment of the court unless the same have been rendered by amicable compounders.

C. C. 3129; *Hopkins vs. La. Western R. R. Co.*, 33 A. 1133.

Award of amicable compounders can be attacked only for fraud or usurpation of power.

Cobb vs. Parham, 4 A. 148; *In re Wallace*, 81 A. 536; *Amet vs. Boyer*, 85 A. 268; *Administrators vs. Kiddell*, 86 A. 105.

460. Award of Amicable Compounders Binding—But if from the submission entered into by the parties it appears that they intended to give the arbitrators power to act as amicable compounders, the court can not revise the award. It must be homologated as it stands, in order that it may have the effect of a definitive judgment.

C. C. 8109.

461. Trial of Oppositions to Reports or Awards—When the homologation of the report of experts or auditors, or of the award of arbitrators, is opposed as above provided the parties may produce testimony, and even examine the experts, auditors, or arbitrators, as to what passed before them.

C. P. 442, 448.

462. Compensation of Experts, etc.—Experts, auditors of accounts, and arbitrators, named in pursuance of the provisions enacted in this section, shall be entitled to receive such compensation for their services as the court may determine, according to the nature of the cause, and such compensation shall be included in the taxed costs, and shall be paid by the party cast.

C. P. 552.

1. Act 19 of 1884, page 25, provides for compensation to be fixed by court where witnesses are called to testify in court only to an opinion founded on special study or experience in any branch of science, or to make scientific or professional examinations, and to state the results thereof. Compensation to be fixed with reference to value of time employed and degree of learning and skill required.

2. Court, on rule, fixes compensation of experts, which rule must be served on all parties to the suit.

State vs. Gauthreaux et al., 85 A. 1168.

3. District courts have power to determine whether witnesses have been heard as experts and fix compensation.
State ex rel. Dardenne vs. Judge, 23 A. 1252.
4. Compensation left to discretion of judge.
Executors of Gordon vs. Maureau, 9 A. 593.
5. But fees of expert short-hand reporter are fixed.
See Act 94 of 1876.
6. Allowance of auditor or expert may be seized.
Vance vs. Lafferanderie, 4 R. 240.
7. Private expert of one party must be paid by that party.
Harrison vs. City, 40 A. 502.

SECTION IV.

Of Setting Causes for Trial, of Continuance, and of Proceedings Preparatory to Trial and Judgment.

463. Setting Cause for Trial—As soon as the answer has been filed in a suit, the clerk shall set down the cause on the docket of the court, in order that it be called in its turn, and a day fixed for its trial in the manner prescribed by special laws, and the rules of the respective courts.
C. P. 476, 424.

(A) Setting causes for trial:

1. Under provisions of intrusion law, R. S. 2595, 2605, defendant may move for fixing of cause without waiting, until answer is joined by his answer.
State ex rel. Pintado vs. Judge, 25 A. 149.
2. In other cases, case fixed when answer filed.
Walton vs. Bank, 12 R. 99.
3. As to fixing of cases, cases which have preference, on docket, etc.
Act 39 of 1880, p. 57.
4. Cases may be fixed when at issue.
Millaudon vs. Gordon, 18 A. 280.
5. No judgment on merits until contested case regularly fixed.
Hazard vs. Boykin, 8 R. 234; Gerber vs. Marzoni, 8 R. 570.
6. Agreement not to try cases during considerable part of year not binding.
Robert & Williams vs. Bank, 18 L. 529.

7. Case is presumed to have been properly and legally fixed and called.

Allen vs. Peytavin, 10 L. 41.

464. Continuance for Failure to have Necessary Evidence—When a cause is called, the party who has not been able to procure the necessary evidence shall be entitled to a continuance, on proving either that he has not sufficient time to get his proof or has been prevented from doing so by some unforeseen cause.

(A) When continuance will be allowed:

1. When commission outstanding and return day not reached and no offer made to admit facts.

Calhoun vs. Traders' Bank, 28 A. 260.

2. When party was prevented from getting his proofs by some unforeseen cause, and no laches are shown.

Montgomery vs. Insurance Company, 18 A. 227; Neyland vs. Neyland, 8 A. 468; 45 A. 688.

3. When party dies and his representatives are to be made parties.

Babcock, Gardiner & Co. vs. Williams, 10 L. 896.

4. When material witness is absent and proper affidavit made.

Klathenhoff vs. ArCry, 14 L. 801.

(B) When continuance should not be allowed:

When sole allegation is:

1. That counsel, living out of parish, is absent.

Cameron vs. Lane, 86 A. 718; Kohn vs. Short, 18 A. 291; but see Smelser vs. Williams, 10 R. 98; Barry vs. Ins. Co., 12 M. 484; 5 N. S. 641; 6 N. S. 886.

2. That party is absent; or that witness is absent, without affidavit that no other witness could establish wanted evidence; that party was diligent; that witness is absent without party's knowledge or consent; that evidence is material.

State vs. Comstock, 86 A. 808; State vs. Robinson, 29 A. 364; State vs. Bradley, 80 A. 826; Richardson vs. Dinkgrave, 26 A. 651; Mills vs. Fellows, 80 A. 824; Saul vs. See's Curator, 2 L. 131; Cameron vs. Lane, 86 A. 716.

3. That commission to take depositions not returned.

Schneider vs. Ins. Co., 82 A. 1049.

4. That witness is insane.

Anderson vs. Birdsall, 19 L. 441.

(C) Nor should continuance be granted:

1. When no diligence is shown in attempting to secure defence.

Adams vs. Dupuy, 2 L. 260; *Erwin vs. Trion*, 2 L. 306; *Reed vs. Frey*, 4 L. 163; *McCarty vs. McCarty*, 19 L. 296; *Rist vs. Abbott*, 268; *Lex vs. Express Co.*, 23 A. 59; *State vs. Nelson*, 24 A. 46; *B. & Caballero vs. Maduel*, 26 A. 118; *Cole vs. LeChambre*, 31 L. 52; *Capdeviel vs. Dodd*, 17 L. 151; *Rogers vs. Davis*, 18 L. 52.

2. When witness not subpoenaed is absent.

Sildell vs. Locke, 18 L. 462; *Golding vs. Steamer Castro*, 20 L. 1; *Richardson vs. Dinkgrave*, 26 A. 651; *Jeter vs. Heard*, 12 A. 2.

3. When evidence of witness desired would be inadmissible.

Fasz & Backer vs. Trager & Noble, 39 A. 292; *Anselm vs. Williams*, 1 L. 87.

465. Continuance for Absence of Summoned Witness.
Affidavit—Even on the day fixed for the trial of the cause, a party may obtain a continuance, if one of the witnesses summoned in the cause has gone away, and the party applying for continuance swear that he did not know that such witness intended to depart, or could not prevent his departure, and that his testimony is material in establishing his claim or for supporting his defence.

R. S. 625, 626, 3959, 3960.

1. Refusal to continue case must be shown and established by proper bill of exception.

Woolridge vs. Rickert & Co., 38 A. 236.

2. Granting continuance matter of discretion.

State vs. Hornsby, 33 A. 1112; *State vs. Wilson*, 33 A. 262; *Laboulton vs. Cotton Rope Co.*, 43 A. 552.

3. Refusal to continue not revisable, except in clear case where refusal arbitrary and injurious.

State vs. Foster, 36 A. 877; *State vs. Johnson*, 36 A. 852; *State vs. King*, 36 A. 153; *State vs. Primeaux*, 39 A. 678; *State vs. Finn*, 31 A. 406; *State vs. King*, 31 A. 179; *State vs. Fulford*, 33 A. 681; *State vs. Revell*, 31 A. 888.

4. Where propriety of granting continuance doubtful, it is safe to grant continuance. Matter lies in judicial discretion.

Cameron vs. Lane, 36 A. 728; *Calhoun vs. Bank*, 28 A. 260; *Neyland vs. Neyland*, 8 A. 467; *Smelser vs. Williams*, 10 R. 97; *Hewitt vs. Henderson*, 9 R. 380; *Rowley vs. Rowley*, 19 L. 558; *Bell vs. Williams*, 3 L. 448.

5. Party must stand on first affidavit for continuance if facts alleged in second affidavit were known to him.

Bell vs. Williams, 3 L. 448.

466. Affidavit as to What is Expected to be Proved—Admission—Member of General Assembly—When one of the parties to a suit prays for continuance on account of the absence of one or several of his witnesses, the adverse party may require him to disclose on oath what facts he intends to prove by such witness; and if such party admit those facts, or if he merely admit, that the witness would, if present, swear to such facts, the court shall proceed to the trial, as if such witness had been examined; provided, that whenever any attorney at law shall be employed in the service of the State, as a member of the General Assembly, his absence from court, unless it be the Supreme Court, during the session of the General Assembly, shall constitute a peremptory cause for the continuance of any case wherein he is employed as leading counsel.

C. P. 188, 486, 440; R. S. 126, 560.

1. Oath required to obtain continuance.

Thompson vs. Ins. Co., 2 L. 229.

2. Counter affidavits not allowed.

Maher vs. Pulley, 8 L. 90.

3. Oath of party required when it can be had, not that of counsel.

Penne vs. Tourne, 2 L. 468; *Lizardi vs. Arthur & Fulton*, 16 L. 579.

4. When affidavit is insufficient.

Brander vs. Flint, Curator, 10 L. 892; *Pruyn vs. Gibbons*, 24 A. 232; *Borron vs. Mertens*, 14 A. 805; *Huff vs. Freeman*, 15 A. 240; *State vs. Robinson* 29 A. 864; *Burton vs. Maltbry*, 18 L. 532.

5. Materiality of testimony must be shown.

Roby vs. Brown, 14 L. 247.

6. Affidavit not part of pleadings and allegations do not enter into *contestatio litis*.

Sacket vs. Hooper, 8 L. 105.

7. Party should not be allowed to take chances of trial and complain of refusal to continue.

McClure vs. King, 15 A. 220.

8. Party against whom continuance is asked may admit that witness if present would swear to facts alleged.

Pruyn vs. Gibbons, 24 A. 231.

467. Deposition of Sick Witness—The sickness of one of the witnesses summoned in the cause is not a sufficient cause of continuance, if such witness live at the place and is in a situation to answer interrogatories; in such case the party insisting for trial may require that his deposition be taken by a justice of the peace, in the presence of the adverse party or of his advocate, or after having notified him or his advocate to attend at the examination.

C. P. 424, 480, 486, 489, 440; R. S. 512, 618.

468. Discretion to Grant Continuance—The court have, besides, a discretionary power to grant continuance whenever the cause alleged by the party applying for it appears sufficient to justify the same.

1. Continuance lies in judge's discretion.

Hopkins vs. La Place, 14 L. 142; Lizardi vs. Arthur & Fulton, 16 L. 578; Powell vs. Jenkins & Walker, 24 A. 444.

2. But where discretion is arbitrarily exercised, and, by repeated continuances, justice is denied, mandamus lies to coerce trial.

State ex rel. Isaacson vs. Judge, 34 A. 76; 9 Pet. 574; State vs. Judge, 4 R. 227.

3. Judge can not *ex proprio motu* grant continuance, unsolicited by either party.

State ex rel. Tooreau vs. Judge, 17 A. 252.

469. Subpœnas to Witnesses—When the cause has been fixed for trial, or even before the same shall have been thus fixed, each party shall obtain from the clerk of the court where the cause is pending, summons for the witnesses intended to be produced in order to compel their attendance on the day fixed for the trial.

C. P. 424; R. S. 3975.

470. Failure to Summon Witnesses No Ground for Continuance—If on the day fixed for the trial one of the parties has neglected to have his witnesses summoned in the manner prescribed in the preceding article, he can not on that account obtain a continuance.

C. P. 466.

471. Continuance Where Witness is Absent, Though Summoned—But if a witness duly summoned do not appear, the party who has had him summoned may, on showing either that the summons was served on such witness or that he could not be found, have the suit continued, or the trial put off until such witness has been attached and brought before the court.

C. P. 134, 135.

1. No attachment can issue when service on witness has not been personal.

State vs. Comstock, 86 A. 308; *State vs. Allemand*, 25 A. 525.

2. Nor where a multitude of witnesses are summoned unnecessarily and process of court is evidently abused.

Houghton vs. Houghton, 11 A. 200.

3. Attachment being outstanding for six months, continuance validly refused.

Carroll & Co. vs. Hamilton, 30 A. 520.

4. Witness not compelled to attend:

When he has attended previous term and his fees are unpaid, though demanded thirty days before second term.

Act 28 of 1882, p. 42.

472. Per Diem and Mileage of Witness—Every witness attending in obedience to a summons of the court, shall be entitled to receive one dollar for every twenty miles which he has to travel in going to and returning from the place where the court is held, besides one dollar a day for every day he shall be detained previous to giving his testimony in the cause. Such costs shall be taxed with the tax fees to be paid by the party cast, provided the number of witnesses summoned in a suit by each of the parties does not exceed six on each side. Each of the parties must pay the witnesses summoned by them respectively beyond that number.

C. P. 135.

1. Witness can not maintain action for mileage and per diem against party who did not summon him, though such party was cast in the suit.

Smith vs. Mayor and Trustees of Shreveport, 10 A. 582; 14 Johns. 2 McCord. Chan. Rep. 244.

2. Clerk must make out jury fee certificates.

Act 87 of 1890, p. 81.

473. Subpœna Duces Tecum Against Party—If one of the parties wish to obtain books, papers, or other documents in the possession of the adverse party, the court shall order, on motion of the party applying for the same, that such books, papers, or documents be brought into court and produced on the day fixed for the trial of the cause. The order must describe such books, papers, or documents.

C. P. 139, 140, 917, 919; Murrison & Co. vs. Butler, 18 A. 197, 296; Murrison vs. Creditors, 8 R. 6.

1. Party residing out of parish can not be required to produce commercial books; certified extracts admissible.

Cooper vs. Polk, 2 A. 159; Cain vs. Pullen, 34 A. 514.

2. Refusal to produce books by one of the parties not punishable for contempt, but facts stated in affidavit for subpœna *duces tecum* are taken as proved.

Columbia Ins. Co. vs. Purcell, 25 A. 283.

474. Subpœna Duces Tecum Against Third Person—The same rule shall govern in cases where a third person, not a party to the suit, has in his possession any books, papers, documents, or books material to the cause, and one of the parties wishes to have brought into court.

But in such cases the order of court requiring the production of such papers, books, or documents, must be served on the party who is called upon to produce the same, and a reasonable time allowed to enable such party to search for and bring the same into court.

C. P. 143, 917, 919.

475. Where Effect of Compliance with Subpœna Will Incriminate—If in the course of the suit either party

covers that his interest require the introduction of titles and papers in the possession of the adverse party, or of a third person, the court shall, on application, order the production of such books or papers; provided, however, that in no case shall a person be compelled to produce papers that would subject him to a criminal prosecution under the penal laws of the State.

C. P. 141, 444.

CHAPTER V.

OF TRIAL AND JUDGMENT.

SECTION I.

Of the Trial and Discontinuance of the Suit.

476. Trial—On the day fixed for trial, the plaintiff shall open the cause, and produce his witnesses and the evidence in support of his demand.

1. Plaintiff not proving his case should be non-suited.

Eureka Insurance Company vs. Tobin & Williams, 25 A. 121; Hereford vs. Lake, 15 A. 698; Morrison vs. French, 8 L. 118.

2. Plaintiff must make out case with legal certainty.

Belrne vs. Gill, 34 A. 8.

3. And testimony of party to suit ought to be corroborated.

McDaniel & Co. vs. Gardner & Co., 34 A. 345.

4. In criminal cases subject matter of cross-examination must be connected and grow out of the examination in chief.

State vs. Poynter, 36 A. 575; State vs. Stuart, 35 A. 1015-1018; State vs. Swayze, 30 A. 1327; 19 A. 119.

(a) And so redirect examination confined to matters elicited in cross-examination.

State vs. Denis, 19 A. 119; State vs. Lacombe, 12 A. 196.

(b) But contrary seems recognized rule in civil cases.

King vs. Atkins, 33 A. 1064; Durnford vs. Clark, 1 M. 202; Davidson vs. Poydras, 12 A. 528; Nicholson vs. Desobry, 14 A. 84.

5. It has been held that court has discretion to abate thing of the strictness of rules of evidence in cases.

State vs. Duncan, 8 R. 563; State vs. Parker, 7 A. 84.

6. Witness can not be contradicted except proper foundation is laid.

State vs. O'Kean, 35 A. 901; State vs. Johnson, 35 A. 871.

7. Place of trial immaterial; court may sit in clerk's office.

Smith vs. Jones, 28 A. 43.

8. Evidence, except under commission, can not be taken of court to confirm default.

Brander, Williams & Co. vs. Goodwin, 6 A. 521; Yorke & Co. & Co., 28 A. 55.

9. Trial *de novo* before succeeding judge. Reintroduction of evidence necessary.

Brinkman vs. Huyghe, 42 A. 112; Ealer vs. Freret, 11 A. 455.

10. Trial in chambers. Such trial illegal except when specially permitted by law, as in rule against defaulting collector.

State ex rel. Pemble vs. Judge, 42 A. 75; Police Jury vs. Brooks, 31 A. 789.

477. Order of Trial—When the plaintiff has closed his evidence, the defendant shall bring his witnesses and produce the proof in support of his defence; the plaintiff may then bring additional witnesses, or his former witnesses, to rebut the testimony adduced by the defendant or to lessen the weight of such testimony.

478. Swearing of Witnesses—Previous to their being examined, the witnesses in a cause must be sworn on the Bible, in open court, and in presence of the parties, to speak the truth, all the truth, and nothing but the truth, in the testimony which they shall give in the cause.

C. P. 349.

Declarations of witnesses in case when pertinent and material to issue are privileged and do not subject them to action for damages even if false and malicious.

Burke vs. Ryan, 35 A. 961; Terry vs. Fellows, 21 A. 876; Warren vs. Kemp, 6 N. S. 477.

479. Affirmation—If the religious opinions of a witness are opposed to his taking an oath, his affirmation of the truth of his testimony shall suffice.

480. Objection to Witness—On the witness coming to be sworn, or to affirm, the party who objects to such witness being examined, must state his objections previous to his having been sworn.

481. Bill of Exception to Reception or Rejection of Witness—If the objections be sustained by the court, the witness shall retire unheard; if received, he shall be sworn and examined; but in either case the party who complains of the decision of the court may except to the same, and file his exception.

482. Competent Witness—Husband and Wife—If the witness be objected to on the ground of his having a direct or indirect interest in the event of the suit, the party making the objections may examine such witness on oath as to the existence of such interest, and the witness must be sworn to answer the truth on the questions which shall be put to him on that head; provided, that the competent witness of any covenant or fact, whatever it may be, in civil matters, is a person of proper understanding; provided further, that the husband can not be a witness for or against his wife, nor the wife for or against her husband, but that in any case where the husband and wife may be joined as plaintiffs or defendants, and have a separate interest, they shall be competent witnesses for or against their separate interest therein.

R. S. 487, 488; C. C. 2281, 2281.

(A) Competency of witnesses.

1. Pardoned convict can testify, but convict who has served term not competent.

State vs. Benoit, 16 A. 275, overruling State vs. Gordon, 7 A. 879.

2. Attorney competent witness.

Succession of Grant, 14 A. 808.

3. Convicts may testify for or against each other.

State vs. Benoit, 16 A. 274.

(B) Husband and wife: Can not testify against each other even consent of party to be affected.

1. In suit by wife for separation of property.

Willis vs. Ward, 30 A. 1282.

2. In divorce cases.

Daspit vs. Ehringer, 52 A. 1174; Dillon vs. Dillon, 52 A. 648; Tull Alexander, 11 A. 628; Harman vs. McLeland, 16 L. 26; Bear Morancy, 2 A. 847.

(C) When spouses may testify.

1. After dissolution of marriage.

Succession of Ames, 33 A. 1817; Reilly vs. Succession of Reilly, 28 A.

2. In suit for or against succession or heirs of deceased spouse.

Lehman, Abraham & Co. vs. Levy, 30 A. 748.

3. In suit by creditor of husband to annul judgment of separation of property.

Hennen vs. Hacker, 52 A. 668; Keller vs. Vernon and Wife, 28 A. Meyer vs. Smith, 24 A. 158.

4. When other spouse has no adverse interest, as in litigation between plaintiff and third opponent.

Schmidt & Ziegler vs. Williston, 27 A. 815; Meyer vs. Smith, 24 A.

5. When one spouse is or was agent of the other. Act of 1888, page 61, amending Art. 2281, C. C., by adding thereto the further proviso: "That in all cases where either spouse has acted as agent for the other spouse, such spouse so acting as agent shall be competent witness as to all transactions arising from, involved in, or connected with such agency. That no statement or statements of either party in suits for separation in property and separation from bed and board or divorce shall be received in evidence."

(D) Compensation of witness:

Act 28 of 1882, p. 42, amending R. S. 3943, provides "any witness who may have been summoned to attend of the courts of this State to testify in a civil case, and have attended, claimed and received a certificate therefor shall not again be compelled to obey any summons for attending said court in said case at a subsequent term,

he be paid by party by whom he was summoned; provided said witness shall have made a demand for payment in writing upon the party who had him summoned, or his attorney when he resides out of the parish, not less than thirty days before the first day of the said subsequent term at which his attendance may then be required.

483. Objection to Evidence—The parties may likewise object to the introduction of documents or other written proofs offered in evidence, when they contend that the same ought not to be admitted as legal proof; the court shall decide on such objections as with regard to the admission of witnesses; but the parties may except to their decision.

C. P. 488.

Act 43 of 1870, page 98, provides for using records in other courts as evidence.

484. No Evidence Received, Except by Consent, After Argument—After all incidental questions shall have been decided, and both parties have produced their respective evidence, the argument commences; no witness then can be heard, nor proof introduced except with the consent of all the parties.

C. P. 489.

1. Prior to argument, after closing of evidence, either party may examine witness, in discretion of court.

Buel vs. New York Steamer, 17 L. 545; Stone vs. Carter, 5 L. 448; Le-Blanc vs. Nolan, 2 A. 228; Suydam vs. Kinney, 7 A. 621; Hill, McLean & Co. vs. Miller, 7 A. 621; City vs. Locke, 10 A. 730.

2. But after argument commences, no evidence introduced except by consent.

Thomas vs. Kean, 10 R. 80; Psyche vs. Paradol, 6 L. 380.

3. If a juror be discharged and another substituted, trial begins *de novo*.

See Follin vs. Foucher, 8 L. 565.

4. Great latitude allowed to courts in application of foregoing articles.

Stone vs. Carter, 5 L. 450; Labarre vs. Hopkins, 10 A. 466.

5. Parties will not be controlled in the order of introduction of proof.

Succession of Barr, 8 A. 458.

6. Judge can not *ex officio* call for evidence after submission of cause.

Sowers & Jamison vs. Shiff, 15 A. 800.

485. Order of Argument—The plaintiff shall speak first, the defendant shall follow; and then the plaintiff shall reply; the defendant may speak again, if any point of law has been raised by the plaintiff in reply. He may comment on any new authority not cited at the opening of the cause; the plaintiff may again reply and close.

R. S. 568; C. P. 515.

486. Proper Conduct by Advocates During Argument—Advocates must plead their causes with propriety and decency; they must not indulge in personal remarks against the parties; nor lose sight of the respect due to the court, to the witnesses, and to the jury; they shall neither interrupt the one who speaks, nor indulge in digressions having no bearing on the cause: and no counsel or other person shall be held liable or responsible, for any slanderous or libelous words uttered by his attorney at law, but attorneys at law shall be liable and responsible for themselves, for any slanderous or libelous words by them uttered.

C. C. 2815; C. P. 182.

1. Parties, as well as advocates, must conduct cases with propriety.

Pike vs. Bates, 84 A. 891.

2. Indecorous and disrespectful brief subjects attorney to contempt and imprisonment.

State vs. Redmond, 9 A. 819.

487. Bills of Exception—If one of the parties calls on the court to express an opinion on the point of law arising in the cause, such opinion may be excepted to.

Bills of exception.

1. Exception must be made at time of giving opinion or ruling.

Voisin vs. Jewell, 9 L. 118; *Cline vs. Caldwell*, 4 L. 19; *Woolridge vs. Rickert*, 23 A. 234; *Noble vs. Flower*, 26 A. 737; *Leggett vs. Peet*, 1 L. 289; *Terrell vs. Boardman*, 24 A. 359; *Phelps vs. Mayer*, 15 How. 160; *Hough vs. Richards*, 6 L. 676.

2. Bills can not be leveled at whole charge.

City vs. Congregation Dispersed of Judah, 15 A. 389; *Yorke vs. Scott*, 23 A. 54; *State vs. Chopin*, 10 A. 458; *State vs. Riculfi*, 25 A. 774; *Rogers vs. Marshall*, 1 Wall. 644; *Harvey vs. Tyler*, 2 Wall. 528.

And objection must appear in bill, not in statement of facts.

Thompson vs. Riggs, 5 Wall. 663; *Generes vs. Bonnemer*, 7 Wall. 564; *Young vs. Martin*, 8 Wall. 354.

3. Act 102 of 1877, p. 176: The party excepting to the opinion of the court may draw a bill of exception in which questions of fact or law on which such opinion has been demanded shall be concisely set forth, as well as the grounds of said exception so taken; provided, that a party desiring to reserve a question in relation to evidence or the charge of the judge to the jury may do so by requiring the reporter or clerk in the parish of Orleans, and the clerk of the court of the country parishes, to take down the same as presented and in the presence of opposing counsel, and the judge shall cause his ruling to be likewise taken down at the time—all of which shall stand in lieu of a bill.

See *Shepherd vs. Wilson*, 6 How. 260.

This act applies only to civil cases; bills in criminal cases must be drawn up in full.

State vs. Jessie, 20 A. 1170; *Eyle vs. Catholic Church*, 26 A. 310; *State vs. Dufour*, 31 A. 304.

4. What otherwise appears of record need not be shown by bill of exceptions.

Harrison vs. Waymouth, 3 R. 341; *New York Railroad Co. vs. Myers*, 13 How. 246; *Pomeroy's Lessee vs. Bank Indiana*, 1 Wall. 592; *Thompson vs. Riggs*, 5 Wall. 663.

488. Bill of Exceptions Continued—The party excepting to the opinion of the court must draw a bill of exception, in which the question of fact or of law, on which

such opinion has been demanded, shall be concise and to the point, and shall set forth, as well as the grounds of the exception so taken.

C. P. 481, 483, 510, 515, 517.

Necessary requisites of bill of exception:

1. Grounds of exception must be stated.

Thielman vs. Gueble & Nippert, 32 A. 261; 4 Wall. 690; Terrell vs. Manly, 34 A. 309; Succession of Grant, 14 A. 308; Camden vs. L. 3 How. 515; Pickens vs. Preston, 20 A. 138; Richard vs. Beaumont, 21 A. 635; McCloskey vs. Bank, 16 A. 235; Whittington vs. Watson, 24 A. 157; Ball vs. Ball, 15 L. 174; LeBret vs. Belzons, Duplessis vs. Kennedy, 6 L. 242.

2. Must be signed by judge.

State vs. Harris, 39 A. 228.

And mandamus lies if necessary to coerce him to sign.

1 Wall. 592; State ex rel. Mullen vs. Drew, 32 A. 1043; State ex rel. Wyly vs. Judge, 35 A. 249; Broussard vs. Heirs, 3 M. 714; State ex rel. D'Hemecourt vs. Judge, Mussina vs. Cavazos, 6 Wall. 265.

3. Must embody decision and ruling of judge on the facts and reasons, if any.

Verret vs. Bonvillain, 32 A. 33; State vs. Dufour, 31 A. 304; G. vs. Creditors, 33 A. 1279; State vs. Green Red, 33 A. 331.

4. But reasons need not be set forth when grounds of exception are.

State ex rel. Mullen vs. Drew, 32 A. 1043.

5. Must be presented to opposing counsel if required.

State ex rel. D'Hemecourt vs. Judge, 13 A. 484.

6. Must be precise and explicit, not vague and indefinite.

State vs. Green, 32 A. 319; State vs. Chopin, 10 A. 456; State vs. 5 A. 342; Hennen vs. Wetzel, 12 L. 265; Ina. Co. vs. Edmondson, 301.

7. Must generally be presented during the term of court in which trial is had.

U. S. vs. Breitling, 20 How. 232.

8. Must be urged, else considered waived.

Cannon vs. White, 16 A. 37; Gaucho vs. Gondran, 20 A. 156; vs. Bridge, 14 A. 721; Stillman vs. Mills, 23 A. 303.

9. Must be reserved before jury retires when directed to return charge of judge.

Hatchcock vs. Gray, 22 A. 472; Penn vs. Collins, 5 R. 216; Steamer, 17 L. 545; see State vs. Judge Buchanan, 12 L. 204.

10. Must be in writing; no verbal reservation.

State vs. McCoy, 29 A. 593.

11. Must be reserved when testimony given; not on refusal of a motion to strike out.

State vs. Rohfrisch, 12 A. 582; Gaines vs. Judge, 12 A. 118; Verret vs. Bonvillain, 32 A. 29; Wafford vs. Wafford, 10 A. 686; Miller vs. Breedlove, 1 L. 322.

12. Must be signed before judgment.

Peytavin vs. Winter, 6 L. 555.

13. Where parties disagree as to facts, judge states facts and his statement prevails.

State ex rel. Hank vs. Judge, 35 A. 1190; State vs. Johnson, 35 A. 969; State vs. Claude, 35 A. 74; State vs. Jessie, 35 A. 1170.

14. Judge may refuse to hear evidence to contradict his recollection and refuse to sign bill.

State vs. Gunter, 30 A. 536; Barataria and Lafourche Canal Co. vs. Field, 17 L. 425.

15. Excluded testimony must be annexed to bill.

Succession of Gray, 3 A. 443; Holmes vs. Holmes, 6 L. 464; Trenchard vs. Elderkin, 3 L. 294; Keene vs. Belf, 11 L. 309.

16. And all documents, etc., necessary to explain same.

Ingraham vs. White, 2 L. 235.

489. Presentation of Bill to Opposing Counsel and the Court—This bill of exception must be exhibited to the adverse party, who may object to any error in the statement therein contained; it shall then be presented to the court, who, after correcting it, if erroneous, shall sign the same, and direct the clerk to file it among the records of the suit.

C. P. 484.

It is discretionary with court to wait until bill of exception can be drawn up.

Thompson vs. Packwood, 2 A. 624; Dean vs. Gridbey, 10 Wendell, 254.

490. Taking Case Under Advisement—After hearing the advocates on both sides, the court may immediately pronounce judgment, or take time to deliberate, pursuant to the provisions of special laws.

C. P. 542.

491. Discontinuance—The plaintiff may, in every stage of the suit previous to judgment being rendered, discontinue the suit on paying the costs.

C. P. 335, 532, 536, 594; 41 A. 746.

1. **Discontinuanee.**

21 A. 729.

Even in Supreme Court.

44 A. 854.

2. **Discontinuanee same as voluntary non-suit and does not interrupt prescription.**

Dennistown vs. Elst, 9 A. 464; Smith vs. Gibson, 6 A. 684.

3. **Judge may refuse discontinuanee under special circumstances and discretion not interfered with.**

Crocker vs. Turnstall, 6 R. 854.

4. **Defendant may discontinue reconventional demand.**

Eronson vs. Duhamel, 4 L. 866.

5. **Defendant preferring reconventional demand may discontinue; likewise all parties in concursio.**

Barrow vs. Robichaux, 15 A. 70; Warfield vs. Ludewig, 9 R. 100; Donough vs. Dutillet, 8 A. 660; Verges vs. Gonzales, 83 A. 100; vs. Garthwaite, 11 A. 287; McDonough vs. Copeland, 9 L. 81; Downs, 9 R. 133; Davis vs. Young and cases cited, 85 A. 740; vs. Parratt, 10 A. 708; Smalley vs. Lawrence, 9 R. 210.

6. **Discontinuanee of plaintiff's demand does not carry over to reconventional demand.**

Smalley vs. Lawrence, 9 R. 210; Davidson vs. Silliman's, 4 L. 226.

7. **Judgment dismissing suit without reserve for reconvention is not a judgment of non-suit; it is conclusive.**

Bledsoe vs. Erwin, 88 A. 615.

8. **Order discontinuing:**(a) **Need not be signed.**

Morgan vs. Whitesides, 14 L. 278.

(b) **Is appealable.**

Donovan vs. Owen, 10 A. 463; Brunet vs. Schaumberg, 10 A. 463; Donnell vs. Parratt, 10 A. 708; but see Pettit vs. Gill, 10 A. 708; Hunter vs. Smith, 5 N. S. 164; Morgan vs. Whitesides, 14 L. 278.

9. **Non-suit entered where plaintiff fails to appeal; reconventional demand in reconvention is made.**

McDonough vs. Dutillet, 8 A. 660.

492. Renewal of Action—After discontinuing the plaintiff may bring the action anew; provided he has paid the cost of the first suit.

C. P. 535, 491, 532.

SECTION II.

Of the Trial Before a Jury.

493. Selection of Jury—The mode of selecting and summoning the jury is established by special laws.

Constitution, 116.

1. Mode of drawing jury.

See Act 94 of 1873, p. 165; Act 44 of 1877, p. 55; Act 24 (Ex. Ses.) 1878, p. 280.

2. Drawing jury in parish of Orleans.

Act 56 of 1877, p. 72; Act 138 of 1877, p. 209; Act of 1894.

3. By Section 10 of Act 44 of 1877, venire not quashed for mere technical informalities, and in absence of charge and proof that fraud was practised and great wrong and injury inflicted.

State vs. Smith, 33 A. 1414; State vs. Harris, 34 A. 119; State vs. Foster, 32 A. 86; State vs. Dozier, 33 A. 1362; State vs. Daniel, 31 A. 94; State vs. Taylor, 27 A. 394; State vs. Miller, 26 A. 580.

4. Motion to quash must be made on first day of term.

State vs. Smith, 33 A. 1415; State vs. Shaw, 5 A. 342; State vs. Daniel, 31 A. 94; State vs. Vegar, 19 A. 105.

5. As to jury commissioners—

State vs. Bealrd, 34 A. 106; State vs. Arata, 32 A. 198; Newhouse vs. Newhouse, 29 A. 824; State vs. Williams, 30 A. 1028; State vs. Revells, 31 A. 387; State vs. Bradley, 32 A. 402; State vs. Thompson, 32 A. 879.

6. For fees, etc., jurors entitled to certificate from clerk of court without cost.

Act 37 of 1890, p. 81.

7. Where statute directs drawing of jury within thirty days, it can not be drawn afterward.

Buhol vs. Boudousquie, 8 N. S. 426.

8. And where jury illegally drawn, judgment reversed and cause remanded.

Compton vs. Legras, 24 A. 253.

494. How and When Jury Demanded—Suits on Negotiable Paper or Unconditional Obligations—The plaintiff who wishes for a jury must pray for the same, either in his original petition, or by a supplemental petition, which must be presented before the suit be set for

trial; provided, that all suits against makers and endorsers of promissory notes, drawers, endorsers and acceptors of bills of exchange, and generally all suits brought on conditional obligations to pay a specific sum of money shall be tried without a jury, unless the defendant make oath that his signature to said note, or other instrument, is not genuine, or that he expects to prove that the same had been obtained through fraud or error, or for want of consideration, or in cases where the defendant in his answer may set up a plea of compensation, reconvention, and make oath to the truth of all the allegations in said plea or answer.

R. S. 561, 747, 838; C. P. 233.

(A) When jury trial allowed:

1. In all suits on unconditional obligations where defendant pleads want of consideration or sets up a reconvention demand and makes oath to the truth of his allegations.
Meyer vs. Weil, 37 A. 161.
2. Where defendant denies under oath genuineness of signature, consideration, or sets up plea of compensation or reconvention.
State ex rel. Chism vs. Boyd, 34 A. 1173.
3. In suit for value of use of house and garden.
Simpson vs. Richardson, 18 A. 121.
4. In suit against husband on note signed by wife and intended to authorize her, though note be given for price of property purchased in wife's name pending existence of community property.
State ex rel. Leeds vs. Judge, 32 A. 543.
5. In suit on note when defendant has obligated himself to pay customary attorney's fees.
Boagni vs. Anderson, 32 A. 320.

And in suit on note claiming with interest from maturity when note bears interest from maturity.

State ex rel. Whitney Iron Works Co. vs. Judge, 44 A. 1.

6. In suits for damages.

Schewer vs. Klein, 15 A. 303.

7. In rule to traverse answers of garnishee as false or insufficient.

Denouveau vs. McNight, 26 A. 74; Hernandez vs. James, 23 A. 483.

8. In suit by injunction of executory process on mortgage note alleged to have been obtained through fraud.

Cormier vs. Soye, 28 A. 548; see Haines vs. Verret, 11 A. 122.

9. In suits on motion against sureties on bail bonds.

Labarre vs. Fry's Bail, 9 M. 881; Gale vs. Quick's Bail, 2 L. 348.

10. In suits contesting right to office.

State vs. Head, 22 A. 55.

11. In a suit by citizens to compel police jury to open public roads.

Pecot vs. Police Jury, 41 A. 708.

(B) Right to jury absolute in proper cases and must not be refused even when asked for purpose of delay.

Frellsen & Stephenson vs. McDonald & Coon, 15 A. 536; Reynolds' Curator vs. Mahle, 12 L. 425; but see Hooper vs. Hyams, 1 R. 90, and cases cited.

(C) Jury trial not allowed:

1. Under C. P. 1036, probate proceedings are without jury.

Devall vs. Succession of Watterson, 18 A. 187.

2. In district court sitting as court of appeal.

Bougueralte vs. Young, 5 R. 162.

3. In injunction proceedings under C. P. 739 and 740.

Amacker vs. Smith, Harris & Co., 16 A. 561; McCracken vs. Wells, 26 A. 83; Dabbs vs. Hempken, 3 R. 123.

4. When compensation pleaded against note is based on unliquidated damages.

Burbridge & Co. vs. Anderson, 32 A. 878.

5. In suits on unconditional obligations to pay money and defendant does not come within exception.

State ex rel. Chism & Boyd vs. Judge, 34 A. 1179; Meyer vs. Well, 37 A. 160; Foster vs. Levison, 10 A. 584.

6. Suit for taxes.

City vs. Cassidy, 27 A. 704.

7. Opposition to homologation of deliberations of creditors of insolvent succession.

Gulon vs. Creditors, etc., 19 A. 82.

8. In suits where the compensation set up is inadmissible, as plea setting up partnership note in compensation of individual note.

Ashley vs. Scholars, 22 A. 442.

9. Where reconventional demand is made in suit on note originally triable by jury.

Pool vs. Alexander, 26 A. 683.

10. When jury trial is not specifically asked.

Foulhouse vs. Gaines, 26 A. 84.

11. In rule to show cause why *pluries* *fi. fa.* should not issue.

Hobson vs. Bein, 2 R. 100.

12. In rule against attorneys to pay over moneys collected.

West's Syndic vs. Carleton & Lockett, 8 L. 254.

13. In suit on note where interest and a privilege are asserted which require extraneous proof.

State ex rel. Whitney Iron Works vs. Judge, 44 A. 1063.

(D) Payment of jury fee of \$12 is condition precedent.

Green vs. Locke et al., 51 A. 656; Act 44 of 1877, § 9; State ex rel. Ney General vs. Lazarus, 40 A. 856.

Except as to state.

State ex rel. Leche vs. Wagner, 42 A. 55.

1. But fee may be paid at any time before case is fixed.

Wilson vs. Bank, 8 A. 195; Louisiana State Bank vs. Ledoux, 2 A.

2. Is payment of jury fee necessary in expropriation proceedings?

Vicksburg, Shreveport & Texas R. R. Co. vs. Hart, 15 A. 507.

(E) No trial by court alone when jury trial has been allowed, though one party fail to appear.

Warfield vs. Hamlet, 28 A. 815; Lewis vs. Klotz, 39 A. 265.

(F) Oath necessary where obligations are unconditional, etc.

1. Oath to answers under interrogatories not sufficient.

State ex rel. Chism vs. Boyd, 34 A. 1179.

2. Oath to answer setting up want of consideration, etc., insufficient.

Frellsen & Stephenson vs. McDonald & Coon, 15 A. 536; Gallot vs. Cluskey & Reilly, 18 A. 259.

3. Oath insufficient when it does not show that allegations would affect plaintiff's right to recover.

Ball vs. Lallande, 20 A. 193; Amado vs. Breda, 16 L. 258; Smith vs. Scott, 8 R. 258; Williams vs. Boozeman, 18 A. 532; Letten vs. Bridge, 18 A. 129.

495. No Jury Allowed After Fixing Case—The defendant, in order to avail himself of the same privilege, must pray for a jury in his answer, or previous to the being set down for trial.

Nevertheless, if in his answer the defendant have only declined the jurisdiction of the court, without answering to the merits, he may, if the plea be overruled, pray for a jury in his answer to the merits.

1. After fixing of case no jury allowed.
Menefree vs. Johnson, 2 R. 274; *Brooks vs. Walker*, 8 A. 151; *Mills vs. Fellows*, 80 A. 924; *State ex rel. Attorney General vs. Carey*, 28 A. 49; *Morgan vs. Police Jury*, 11 L. 158; *Wood vs. Lyle*, 4 A. 146.
2. Nor where case is continued by preference.
Wheless & Pratt vs. Fisk, 28 A. 781.
3. But where case, though once fixed, does not stand fixed or continued by preference, a jury may be allowed.
Gallagher vs. Hebrew Congregation, 84 A. 527; *Bank vs. Duplessis*, 2 L. 651; *Bank vs. Duplessis*, 2 A. 651; *Wilson vs. Bank*, 8 A. 196.
4. Jury may be asked and allowed on new trial.
Kalley vs. Lanahan, 84 A. 427; but see *Bougueraite vs. Young*, 5 R. 162.
5. But not pending trial.
Butler vs. Kenner, 7 M. 561.
6. But suits brought to remove district attorneys, clerks of court, sheriffs, coroners, recorders, justices of the peace, and of all other parish, municipal, or ward officers under Articles 196 and 200 Constitution, jury must be asked in original petition or answer.
Act 185 of 1880, p. 185; 28 A. 606; *State vs. Head*, 21 A. 550.
7. No waiver of jury at moment of trial without consent.
Lewis vs. Klotz, 89 A. 265; *Livaudais vs. Spear*, 10 A. 24; 2 M. 48.
8. Trial without jury waives it.
LeBlanc vs. Johns, 8 M. 819.
 Where one defendant asks jury and another does not, court shall allow trial to one only who asks.
Mulholland vs. Henderson, 8 R. 297; *Smith vs. Scott*, 8 R. 258.
9. Court may *ex proprio motu* order a jury in proper cases, even during trial.
Livaudais vs. Spear, 10 A. 24; *Burke vs. Breazeale*, 1 R. 78; *Hoffman vs. Ins. Co.*, 1 A. 216.
10. Judge has discretion to grant jury asked in amended answer.
Davis' Heirs vs. Prevost, 6 N. S. 265; *Hooper vs. Hyams*, 1 R. 90; *Green vs. Bondurant*, 7 N. S. 280.
11. Intervenor may claim jury.
Leclerc vs. Menard, 7 M. 536.

496. Drawing of Jury from Box—When a cause is to be tried by a jury, the name of each of the jurymen summoned to try it, shall be written separately on tickets, which shall be put in a box destined for this purpose, from which they shall be drawn by the clerk in the manner prescribed in the following article.

R. S. 2185, 562.

Where sheriff or clerk, or the wife of either, is a party, and there is no coroner, how must jury be drawn and preserved?

See State vs. Judge, 11 A. 73.

497. Selection and Listing of Jury—As soon as a sufficient number of jurymen shall be present, the court shall call the cause to be called, and the clerk shall draw out of the box, one by one, the tickets on which the names of the jurymen have been written, and then he shall form the jury of them in the order in which they shall have been drawn.

498. Jury Drawn in Each Case, Unless Drawn Waived—The formality of drawing the names of jurymen as prescribed in the preceding article, shall be repeated for each cause to be tried, unless the court shall dispense with this formality, or unless the parties shall consent to call the names of the jurymen in any other manner than by drawing.

499. Jury Called and Sworn Three at a Time—Challenges Must then be Made—When the list of the jury present shall have been formed in the manner as specified, or when the court shall have ordered, or the parties agreed, to call them in any other manner, the jurymen shall be called three at a time to be sworn; the parties must then make their challenges to the court, if they have any cause therefor, either to the array or to the poll.

500. Challenges—Challenges may be made to the array or to the poll.

501. Challenge to Array—A challenge to the array may be made for any irregularity in the manner of summoning the jurymen, or of drawing their names.

But it shall not be deemed a good cause to challenge the array, that a number of jurors actually drawn at any time was not the exact number required by law; and although one or more of the jurymen on the list should lack the qualification required by law, it shall not be cause sufficient to challenge the whole array, but any such juror may be challenged peremptorily by either party.

DeBuys vs. Mollere, 7 M. 320; *Ramos vs. Bringier*, 7 M. 100; *Compton vs. Legras*, 24 A. 259.

Objection to venire can not be made after verdict.

Vidal vs. Thompson, 5 M. 374.

502. Challenge to the Polls—For Cause and Peremptory—Challenges to the polls are divided into two kinds, one founded on legal and sufficient reasons, another which depends on the will of the parties, without their being obliged to make known their motives for so doing.

1. As a general rule, juror can not be challenged after he is sworn.

State vs. Isaac, 3 A. 259; *State vs. Dubard*, 2 A. 732; *State vs. Kennedy*, 8 R. 596; *State vs. Diakin*, 34 A. 920; *Livingston vs. Herman*, 4 M. 707.

2. But juror may be excused for cause when, after swearing, he informs court of some cause of incompetency.

State vs. Diakin, 34 A. 920; *People vs. Damon*, 18 Wend. 351.

3. Judge has large discretion in excusing jurors, which is not subject to complaint, especially when sufficient number left on panel to try the case.

State vs. Soumier, 33 A. 238; *State vs. Kane*, 32 A. 999; *State vs. Webster*, 34 A. 991; *State vs. Elol*, 34 A. 1195; *State vs. Farrer*, 35 A. 317.

4. Judge not bound by answers of juror, and may exclude him according to circumstances, and may take notice of prosecution pending against juror.

State vs. Barnes, 34 A. 397; *State vs. Jackson*, 35 A. 769.

503. Challenges for Cause—Challenges to the polls, the causes of which the parties are bound to declare and prove, are those which are founded:

1. **Want of Qualifications:** Upon the juryman's having the qualification required by law.

2. **Partiality:** Upon his being suspected of some partiality or favor for one of the parties.

3. **Conviction of Crime:** Upon his having been convicted of some crime or misdemeanor, which legally renders him incapable of acting as a juryman.

Challenges on Ground of Exemption, Relationship Alliance—No juror shall be challenged by either party on the ground that he is exempted by law from serving on juries, nor on the ground that he is related or allied to either party, unless such relationship or alliance be within the sixth degree, according to the computation of the civil law.

(A) Challenges for cause are those founded upon:

1. Want of necessary qualifications, which are established by Act 54 of 1880. Juror must be:

- (a) Citizen of the United States and of this State, and
- (b) A *bona fide* male resident of the parish for one year preceding service;
- (c) Not under interdiction.
- (d) Nor charged with any infamous crime or offence punishable by hard labor,
- (e) Nor convicted at any time of any infamous crime or offence punished by hard labor, unless he has been pardoned,
- (f) And be a competent and intelligent person, having capacity to serve as a grand juror and try and determine both civil and criminal cases.

And judges have discretion "to decide upon the competency of jurors in particular cases where challenged from physical infirmity, or from relations within the fourth degree, to be computed according to civil law, or from the ignorance of the English language and inability to understand

same when read or spoken, or other cause, the person called may be incompetent to sit upon the trial of any particular cause."

2. Judge may excuse juror not understanding English language.

Bank vs. Straus, 26 A. 736.

(B) *Juror incompetent:*

1. When he is charged with infamous offence and prosecution is pending.

State vs. Jackson, 85 A. 769.

2. When he has already formed a fixed opinion:

But juror competent when opinion will yield to testimony and when juror free from bias and prejudice.

See also 34 A. 896; 4 A. 505; 11 A. 607; 6 A. 653; 3 R. 535; 32 A. 1098; 14 A. 673; State vs. Demouchel, 32 A. 1241; State vs. Hornsby, 33 A. 1110; State vs. McGee, 36 A. 207; State vs. Revells, 35 A. 304; State vs. Johnson, 33 A. 889; State vs. Dugay, 35 A. 327; State vs. DeRance, 34 A. 186; State vs. Bunker, 14 A. 462; State vs. Ward, 14 A. 698; State vs. Malone, 22 A. 43; State vs. Caulfield, 23 A. 148; State vs. Lartigue, 29 A. 642; State vs. Coleman, 27 A. 692; State vs. Brette, 6 A. 653; State vs. Denis, 34 A. 1078; State vs. Farrer, 35 A. 816; Stachlin vs. Destrehan, 2 A. 1019.

3. When juror not a voter.

R. S. 2125; State vs. Parks, 21 A. 251; Golding vs. Petit, 27 A. 86.

4. When juror does not understand English.

State vs. Lewis, 23 A. 84; State vs. Push, 23 A. 14; State vs. Jean Gay, 26 A. 472.

Formerly this requirement did not exist.

Gay vs. Ardry, 14 L. 238.

5. When juror infirm, deaf or mute.

State vs. Push, 23 A. 14.

(C) *Juror can not be challenged as incompetent on ground that:*

1. He is ignorant; but judge may excuse him.

State vs. Lewis, 23 A. 84.

2. Jury of merchants must possess other legal and necessary qualifications.

Golding vs. Petit, 27 A. 86.

3. When special jury of merchants should be allowed.

R. S. 2153; Kellogg vs. Clinton, 23 A. 674.

4. Qualifications of jurors.

See Act 44 of 1877, p. 55; 94 of 1873, p. 165; 54 of 1880, p. 52

504. Challenges, Continued—The causes of challenge which have been mentioned in the preceding articles are to be understood in the sense and under the modifications hereafter mentioned.

505. Public Officials Exempt from Jury Service—A juryman may excuse himself, if he fills any public functions, which by their nature or the provisions of law exempt him from serving as a juryman.

Auzan's Case, 1 M. 268.

Exemptions from jury service.

1. Telegraph operators.

Act 42 of 1882, p. 54.

2. Clerks and other officers of courts.

Act 94 of 1878; State vs. Newton, 28 A. 68.

3. Governor, lieutenant governor, attorneys, physicians

Act 44 of 1877, Sec. 2.

506. Juryman Must be Duly Qualified Elector—A man may be challenged, because he does not possess the qualification required by law.

This qualification is, that the juryman must be a qualified elector, without regard to race, color, or previous condition.

507. Challenge for Partiality—A juryman may be challenged, as suspected of partiality in the cause:

1. Domestic, Agent, Attorney, Partner or Relative Party—If he be a domestic, counsellor, attorney, or partner of one of the parties, or related or allied to either one of them within the sixth degree;

2. Interest in Cause—If he have an interest, direct or indirect, in the cause;

3. Former Service as Juror in Same Cause—If he have already served as juryman in the same suit;

4. Formation of Opinion—If he have formed an opinion upon the cause before coming into court;

5. Bribery—If he have received any bribe for giving his verdict.

Formerly a juror member of a political corporation could not serve.

Mayor et al. vs. Ripley, 2 L. 845; but see C. P. 838, *contra*.

508. Challenge for Crime—A juryman may be challenged for crime by him committed, if he has been convicted of any crime deemed infamous by the penal laws of this State.

509. Sworn Examination of Challenged Juror—The juryman challenged for any one of the above mentioned causes, may be interrogated under oath concerning the truth of the facts alleged against him, and he must answer such questions touching the matter, provided that he do not expose himself to injure his reputation, or accuse himself of some crime or misdemeanor.

510. Ruling of Judge on Challenge—Exception—The judge shall pronounce upon the challenges to jurymen in the same manner as upon those made to witnesses, and the party who may think himself aggrieved by his decision may, in like manner, take an exception to his opinion.

C. P. 488, 517.

511. Peremptory Challenges—Besides the challenges, the causes of which the parties must declare and prove as above, the plaintiff and defendant have each the right of challenging peremptorily four jurymen.

In contested election cases, ten peremptory challenges allowed.

R. S. Secs. 1429, 1422; Burton vs. Hicks, 27 A. 509.

512. Co-Plaintiffs and Co-Defendants, Joinder in Challenges—When there are many plaintiffs or defendants in a cause, the parties who are equally interested

will be obliged to join, in order to enjoy the right of challenging which has been mentioned in the preceding article, so that there may be no more than four jurymen peremptorily challenged on each side.

513. Talesmen—If, on account of the challenges, absence, or sickness of some of the jurymen, or of any other legal excuse, the jury should not be complete, the court shall order the sheriff to summon a certain number of persons present, having the legal qualifications, in order to complete it.

1. Talesmen.

(a) Need not be from bystanders only.

State vs. Thomas, 84 A. 1065.

(b) Juror discharged or excused from regular panel not summoned as a talesman.

Golding vs. Castro, 20 A. 458.

2. Court may summon additional jurors, under act of 1877, who are not talesmen but part of regular panel.

State vs. Brooks, 86 A. 585.

3. Attachments for absent jurors will not issue where there are sufficient present to form panel.

State vs. Farrer, 85 A. 816; *State vs. Breaux*, 82 A. 222; *State vs. Rountree*, 82 A. 1144; *State vs. Hoozer*, 26 A. 600; *State vs. Atkinson*, 20 A. 545.

4. Any number of orders necessary for talesmen may be made.

State vs. Sonnier, 88 A. 289.

5. Judge may exempt talesmen though temporary challenges exhausted.

State vs. Hamilton, 85 A. 1048; *State vs. Welch*, 84 A. 991.

514. Oath of Juror—Foreman—As soon as a jurymen shall have been accepted by the parties, or the challenge made to him shall have been overruled by the court, he shall take an oath that he will pronounce, in a just and impartial manner, and to the best of his judgment, in the case of such a one against such a one (naming the title of the cause), which is about to be submitted to him; and 22

soon as there shall be twelve jurymen sworn, the court shall name from amongst them a foreman who shall pre-side over them, and sign the verdict which they may ren-der.

1. Objection to form of oath or competency of juror must be made when juror is offered to be sworn.

State vs. Sophor, 85 A. 976; *State vs. Nolan*, 18 A. 276; *State vs. Bower*, 26 A. 898.

2. But see *contra* in civil cases.

Henry vs. Cuvellier, 7 M. 682.

515. Mode of Trial Before Jury—Charge of Judge—The case shall be pleaded before the jury in the same manner as before the court; and when the pleadings are finished, the judge shall charge the jury on the form of giving their verdict.

In all cases appealable to the Supreme Court, it shall be the duty of the judge to deliver his charge to the jury in writing, if the counsel of either party require the same.

O. P. 436, 487, 498; *R. S.* 568, 28.

1. Judge's written charge to jury may be transcribed from book by clerk.

State vs. Thomas, 84 A. 1085.

2. Judge can not draw up verdict.

Gore vs. Breedlove, 5 R. 78.

516. Charge of Judge—In this charge the judge must limit himself to giving the jury a knowledge of the laws applicable to the cause submitted to them, and he shall abstain from saying anything about the facts, or even re-capitulating them so as to exercise any influence on their decision in this respect.

1. Special instructions desired ought to be asked by parties.

State vs. Thomas et al., 84 A. 1084; *State vs. DeRance*, 84 A. 191; *State vs. Bogain*, 12 A. 264.

2. Judge must not state facts except so far as necessary to charge properly.

Spofford vs. Pemberton, 12 R. 163.

(a) And where he trenches upon facts, judgment is reversed.

Moller vs. Gauche, 16 A. 42.

(b) Charge must be applicable to issue made by pleadings and not merely on abstract questions of law; and refusal to make abstract charges is not error.

State vs. Thomas, 34 A. 1084; *State vs. Stouderman*, 8 A. 287; *State vs. Turner & Bright*, 35 A. 1108; *United States vs. 357 cases of wine*, 1 Woods 47.

3. Judge need not repeat charge already given.

State vs. Hartleb, 35 A. 1180; *State vs. Brown*, 35 A. 1058; *State vs. Garlic*, 35 A. 971.

4. Judge's charge must be excepted to below. Objections can not be assigned as error.

Milne vs. R. R. Co., 9 L. 257; *Buel vs. Steamer*, 17 L. 545; *Penn vs. Collins*, 5 R. 218; *State vs. Garlic*, 35 A. 975; *State vs. Curtis*, 34 A. 1214; *State vs. Rioult*, 35 A. 770; *State vs. Sheard*, 35 A. 543; *State vs. Ricks*, 32 A. 1098; *State vs. Baird*, 34 A. 106.

5. And objection must be made before jury retire.

Bank vs. McKellar, 44 A. 944; *Penn vs. Collins*, 5 R. 213.

6. Where evidence sustains verdict, mere improper charge will not be fatal.

Stackpole vs. Wickham, 7 A. 658; *N. O. Opelousas R. R. Co. vs. Lagarde*, 10 A. 150; *Starns vs. Hadnot*, 45 A. 332.

517. Exception to Charge—Request for Written Charge

—If, when the judge shall have finished his charge to the jury, one of the party believes that the judge has mistaken the law which he has stated to the jury, or in the application which he has made of it, he may require the judge to give his opinion in writing touching this matter, and on his refusal he may take an exception in the manner and form heretofore set forth.

C. P. 488, 489.

Exception must be taken before jury retire.

Bank vs. McKellar, 44 A. 944; *Penn vs. Collins*, 5 R. 213.

518. Deliberation—Verdict—When the jury shall have retired into the room designated for this purpose, they shall deliberate, under the direction of their foreman, upon their verdict, and as soon as they shall have agreed

upon the manner of giving it, the foreman shall reduce the verdict to writing, and sign it, as is hereafter mentioned, and give notice to the court, if it be still in session, that the jury are ready to give their verdict.

C. P. 522, 526, 527.

1. Jury may take papers with them if they are evidence in the case.

State vs. Williams, 84 A. 961; State vs. Bradley, 6 A. 555; State vs. Harris, 84 A. 119.

But *contra* in criminal cases.

29 A. 715.

2. Verdict may be received on *dies non*. Such act is purely ministerial.

State vs. Canty, 41 A. 587; State vs. Ford, 37 A. 443.

519. Kinds of Verdict—General and Special—The verdict may be either general or special. A general verdict is that by which the jury pronounce at the same time on the fact and the law, either in favor of plaintiff or defendant.

A special verdict is that by which the jury pronounces on the facts only, leaving to the court the right of giving judgment on these facts and the law applicable to them.

520. Jury May Always Render General Verdict—The jury is always at liberty to give a general verdict by pronouncing on the law and on the fact, in the case submitted to them.

Therefore, the law permitting either party to submit specially the facts in the case to the jury, and so depriving them of the right of giving a general verdict in the suit, is abrogated.

Barry vs. Ins. Co., 6 M. 394; Morris vs. Hatch, 7 M. 249.

521. Special Verdict—New Trial—But should the jury think proper to render a special verdict on the facts of the cause, those facts which the jury shall have found shall be considered as true, and the judge shall render judgment

accordingly, saving the right of granting a new trial if he believe that the jury have given their verdict contrary to the evidence.

1. Validity of verdict not impaired by remarks of jury not inconsistent.

Wallis vs. Bazet, 34 A. 181.

2. Verdict must be positive, not conditional or in the disjunctive.

Wall vs. Hampton, 8 M. 158.

3. Verdict construed by pleadings, and whole verdict construed together.

Greenfield vs. Manning, 7 L. 56; *Trepagnier vs. Dumford*, 2 M. 557; *Harrison vs. Faulk*, 3 L. 68; *Innis vs. Crummin*, 6 M. 647; *Fortier vs. Blount*, 6 M. 451.

4. Findings of jury on facts can be reversed by Supreme Court.

Cardaillac vs. Dutton, 21 A. 219; *Castel & Devaux vs. Creditors*, 7 L. 578; *Michel vs. Weil*, 25 A. 209; *Richardson vs. Zuntz*, 26 A. 318; *Painpale vs. Martin*, 14 L. 60.

5. But will not lightly be disturbed in cases of fraud and where evidence conflicts.

Lapointe vs. Guidry, 7 L. 246; *Rousseau vs. Dayson*, 10 M. 142; *Husset vs. Lefebvre*, 6 L. 603; *Brown vs. Sadler*, 21 A. 183; *Flower vs. O'Connor*, 7 L. 189; *Sheldon vs. New Orleans Canal Co.*, 9 R. 86; *Coon vs. Brashear*, 7 L. 270; *Orleans Navigation Co. vs. Allard*, 6 L. 486; *Peytavin vs. Winter*, 6 L. 555.

6. Remittitur after verdict allowed.

Pargoud vs. Morgan, 2 L. 102; *Mead vs. Buckner*, 2 L. 286.

7. Where verdict silent about interest, judgment of court can allow none.

Succession of Anderson, 33 A. 583; *Saul vs. His Creditors*, 7 N. S. 437; *Cochrane vs. Murphy*, 4 A. 6; *Succession of Regan*, 12 A. 116; *Nichtrecht vs. Fasnacht*, 17 A. 166.

522. Form of General Verdict—The form of a general verdict consists in the foreman endorsing on the back of the petition, these words: "Verdict for the plaintiff for so much, with interest," if it has been prayed for; or, "Verdict for the defendant," according as the verdict is for plaintiff or defendant.

C. P. 563.

1. This article is directory and substantial compliance sufficient.
City vs. Foucher, 9 L. 410; Wichtrecht vs. Fasnacht, 17 A. 186; Cooper vs. Cappell, 29 A. 214.
2. Verdict need not state details.
Harrod vs. Lafarge, 6 M. 11; McClellan Dry Dock Co. vs. Farmers' Alliance Steamboat Line, 48 A. 268.
3. Verdict for sterling money irregular—should be for U. S. money.
Beal vs. McKiernan, 8 L. 570.
4. On return of jury with verdict, counsel for party winning may reduce same to form and hand to jury for consideration.
Jackson vs. Laroche, 4 M. 499.
5. Jury may seal verdict and deliver in court.
Dale vs. Down, 9 M. 495.
6. Verdict silent as to interest rejects it.
Cochrane vs. Murphy, 4 A. 6.
7. Verdict may be for full amount of claim.
McClellan Dry Dock Co. vs. Steamboat Line, 48 A. 268.
8. But where amount is not stated and no way is pointed out to find amount allowed, verdict is bad.
Miller, Lyons & Co. vs. Cappel, 39 A. 382.

523. Costs Follow Judgment—The jury has nothing to do with the costs in a general verdict, inasmuch as it is entirely reserved for the court to pronounce on this subject, which is a consequence of its judgment.

524. Form of Special Verdict—When the verdict is special, the foreman must write on the petition, or on a separate sheet of paper, and successively, the different facts which they find in the cause.

525. Foreman Must Sign as Such—Whether the verdict be general or special, the foreman must sign it, mentioning his quality.

Capacity of foreman of grand jury need not be mentioned.
State vs. Sopher, 35 A. 976.

526. Polling of Jury—When the jury have returned into court, in order to give in their verdict, the judge shall order the clerk to call the jurymen, to ascertain that they are all present; and if the jury be all present, the foreman shall hand the verdict to the judge, who shall order the clerk to read it in a loud and intelligible voice.

527. Polling, Etc., Continued—After the reading of the verdict, he shall ask the jury if the verdict has been agreed to, and if the foreman answer affirmatively, he shall enter the verdict on the records of the court, unless one of the parties require that the jurors be called and each of them asked if he has agreed to the verdict, and if it appear that all the jurors have agreed to the verdict, the same shall be recorded.

The above is Act 116 of 1890, p. 141.

528. Correction of Form of Verdict—If, on reading the verdict, it appear that there is some want of form as to the manner in which it has been drawn, it may be corrected at the request of either of the parties, under the direction of the court, either in their presence, or after the jury shall have retired for that purpose, in which case it shall again be brought into court, after having been corrected, in order to be read and recorded, as above directed.

1. No objection as to want of form not made below will be noticed on appeal.

Behines vs. Cox, 2 A. 472; Simon vs. Brashear, 9 R. 60.

2. Irregularity of method of returning verdict not specially injurious is not fatal.

Cooper vs. Cappell, 20 A. 214.

529. Sealed Verdict—If the court intend adjourning to the next day, previous to the jury having brought in their verdict, they may authorize them, after they have agreed

on their verdict, to deliver the same, sealed, to the clerk of the court, in order that it be read the following day, at the opening of the court.

In such case, the jury must attend in court to be present at the reading of their verdict.

530. Sick Juror May Testify Before Justice How He Voted—If, pending the adjournment, some member of the jury have fallen sick, so as to be unable to be present in the court when the verdict is read, the court may commission a justice of the peace to take the declaration, on oath, of such juror, as to the manner in which he voted, at the time the verdict was agreed to, unless the parties agree to dispense with his declaration.

Evidence of a juror not admissible to impeach verdict.

State vs. Chretien, 35 A. 1032.

531. When Juror Dies After Voting, etc.—If a juror die during the adjournment, the court shall examine, on oath, either the foreman or any other member of the jury, in order to ascertain the manner in which the deceased voted at the time the verdict was agreed to, and the testimony of such juror shall have the same effect as the declaration of the deceased would have had, were he alive.

532. Discontinuance Permitted Up to Withdrawal of Jury—The plaintiff, until the moment when the jury shall be about to withdraw, is at liberty, on paying the costs, to discontinue his suit; but if the plaintiff allow the jury to withdraw, before discontinuing his suit, the verdict shall be binding on him.

C. P. 835, 491, 492, 536, 594.

1. Discontinuance allowed up to time of withdrawal of jury.

LeBlanc vs. Pittman & Barrow, 16 A. 430; *Meyers & Co. vs. Birotte*, 41 A. 745.

2. Discontinuance of main action carries intervention.

Barron vs. Jacobs, 38 A. 370; *Meyers & Co. vs. Birotte*, 41 A. 745.

SECTION III.

Of Judgments and Costs.

533. Judgments—Judgments in civil cases are rendered by default, or after hearing the parties.

C. P. 810.

(A) Judgments must be:

1. *Certain*, and may be construed by pleadings or by reasons given.

Lea vs. Terry, 15 A. 160; 14 A. 831; *Bonvillain vs. Bourg*, 16 A. 365; *Rust vs. Faust*, 15 A. 478; *Trepagnier vs. Williams*, 4 L. 100; 14 L. 446; *Succession of Durnford*, 1 A. 92; *Peniston vs. Somers*, 15 A. 679; *Rochele vs. Cox*, 5 L. 267; *Keane vs. Fisher*, 10 A. 261, 177; 86 A. 28; *Barns vs. Bidwell*, 28 A. 296.

But only in cases of doubt requiring construction.

Avery vs. Police Jury, 15 A. 228.

2. But in proper cases judgment may be *conditional* and executive officer may receive conditional instructions.

Brainard & Geoffroy vs. Head, 26 A. 489; *Succession of DeBoisblanc*, 82 A. 17; *State ex rel. R. E. Co. vs. Judge*, 85 A. 220; *Davidson vs. City*, 84 A. 178; *Carre vs. City*, 42 A. 1112.

(B) Collateral attack on judgment:

1. No collateral attack permitted where judgment not void for want of jurisdiction, *e. g.* judgments:

(a) Homologating monition.

Frost vs. McLeod, 19 A. 69.

(b) Adjudicating community property to surviving spouse.

Succession of Robinson, 28 A. 17; *Sanders vs. Carson*, 2 A. 394.

(c) Emancipating minor.

Johnson vs. Alden, 15 A. 505; *Jeannet & Co. vs. Eicker*, 10 A. 66; *Fabre vs. Hepp*, 7 A. 8.

(d) Appointing tutor.

Thibodeau vs. Thibodeaux, 5 A. 598; *Martin vs. Jones*, 12 A. 186; *Tutorship of Hughes*, 18 A. 880; *Succession of Garrison*, 15 A. 27; *Succession of Keller*, 39 A. 582; *Succession of Winn*, 3 R. 805; *Hoover vs. Sellers*, 5 A. 182; *Coillebeau vs. Ingrout*, 14 A. 623.

(e) Consent judgment between parties.

Dunn vs. Pipes, 20 A. 276; *Greenwood vs. City*, 12 A. 426.

- (f) **Acceptance of cession of insolvent.**
Jeffries vs. Iron Works Co., 15 A. 19; *Nimick, McCloskey & Co. vs. Ingram*, 17 A. 86; *Armstrong vs. Mooney*, 1 R. 167; *Taylor vs. Creditors*, 9 R. 576; *Hayney vs. Healey*, 12 A. 424; *Bajourin vs. Ramelli*, 85 A. 788; *Andrus vs. Creditors*, 45 A. 1067, *et seq.*
- (g) **Appointing public administrator.**
Morgan vs. Locke, 28 A. 808.
- (h) **Appointing executor.**
Succession of Dougart, 30 A. 263.
- (i) **Appointment of syndic.**
Cloutier vs. Lemee, 33 A. 805; *Bojourin vs. Ramelli*, 85 A. 783.
- (j) **Recognizing a homestead.**
Calvit vs. Williams, 85 A. 822; *Anderson vs. Duson*, 85 A. 917.
- (k) **Granting a respite.**
Anderson vs. Duson, 85 A. 915.
- (l) **Appointing a curator.**
Duson vs. Dupre, 82 A. 896.
- (m) **Appointing administrator.**
Davie vs. Stevens, 10 A. 496; *Davis vs. Greves & Wilderman*, 32 A. 420; *Dean vs. Wade*, 8 A. 85; *Ella vs. Viesti*, 2 L. 249; *Williams vs. Hood*, 11 A. 118.
- (n) **Ordering sale of property.**
Gillis vs. Carter, 29 A. 699.
- (o) **Ejecting tenant.**
Huyghe vs. Brinkman, 84 A. 831.
- (p) **Adjudging defendant to pay certain sum to plaintiff.**
Succession of Quin, 80 A. 947; *Succession of Neal*, 25 A. 125; *Kent vs. Brown & Learned*, 88 A. 118; *Bryan vs. Atchison*, 2 A. 463.
- (q) **Ordering partition.**
Bayhl vs. Bayhl, 85 A. 529; *Paul vs. Lamothe*, 86 A. 318; *Fowler vs. Gordon*, 24 A. 270; *Estate of Bonton*, 11 A. 621.
- (r) **Appointing foreign guardian or tutor.**
Martin vs. Jones, 12 A. 168; *Succession of Penniger*, 24 A. 54.
- (s) **Appointing under-tutor.**
Succession of Kellar, 39 A. 584; *Succession of Hawkins*, 85 A. 598; *Succession of Sadler vs. Henderson*, 85 A. 829; *Succession of Arland*, 42 A. 820.
- (t) **Separating spouses in property.**
Lewis vs. Peterkin, 39 A. 780; *Farwell vs. O'Neal*, 22 A. 619; *Dink-grave vs. Norwood*, 10 A. 564.
- (u) **Proceedings in attachment suits where there is:**
- (1) **Legal citation on defendant.**
Bank vs. Judson, 9 A. 8; *Gibson vs. Foster*, 2 A. 509; *Goodman vs. Allen*, 11 A. 246; *Williams vs. Clark*, 11 A. 761; *Ins. Co. vs. DeBlanc*, 31 A. 103.

(2) Acquired jurisdiction of the *res*.

Pennoyer vs. Neff, 96 U. S. 725.

(v) In proceedings to reinstate record and judgment destroyed by fire.

McFeeley vs. Osborn, 19 A. 471; Starns vs. Hadnot, 42 A. 363.

(w) Order of recusation.

State ex rel. Mesteyer vs. Judge, 86 A. 823.

(x) Appointing curatrix.

Hogan vs. Thompson, 2 A. 538.

(y) Ordering sale of property.

Dupuy vs. Bemis, 2 A. 509; Thompson vs. Tolmie, 2 Peters, 163.

(z) Appointing provisional syndic.

Succession of Altemus, 82 A. 864; Succession of Dugas, 30 A. 263.

(a1) Appointing judge *ad hoc*.

State ex rel. Williams vs. Constable, 83 A. 1418; Gullbeau vs. Cormier, 82 A. 980; State vs. Fenderson, 28 A. 82; State ex rel. Mesteyer vs. Judge, 86 A. 830.

(b1) Accepting surrender and ordering meeting of creditors.

Bajourin vs. Ramelli, 85 A. 788; Andrus vs. Creditors, 45 A. 1067.

(c1) Appointing liquidator.

Southern Mutual Insurance Co. vs. Pike, 83 A. 823.

(d1) Recognizing claim against succession.

Succession of Quin, 80 A. 947; Succession of Neal, 25 A. 125; Succession of Bernard, 24 A. 402.

(e1) Discharging administrator.

Baron vs. Administrator, 44 A. 295.

(C) *There is no collateral attack where suit is to declare judgment inoperative by reason of changed conditions, e. g.:*

1. Suit by heirs to recover confiscated property.

Heirs of Slidell vs. Bank, 27 A. 354; Day vs. Tricou, 18 Wall. 153; Bigelow vs. Forest, 9 Wall. 339.

2. Suit to declare property not a homestead by reason of change in condition of beneficiary—though homestead was recognized by judgment.

Denis vs. Ayle, 40 A. 286; Davidson vs. City, 84 A. 170.

But no execution can issue while judgment recognizing homestead stands.

Calvit vs. Williams, 85 A. 822.

(D) Collateral attack is permitted on judgment:

1. Where judgment is absolutely null for want of citation.

Conery vs. Rotehford, Brown & Co., 80 A. 694; Walworth vs. Stevenson, 24 A. 238; Simpson vs. Hope, 28 A. 557; Marbury vs. Pace, 29 A. 557; McCloskey, Bigley & Co. vs. Wingfield & Bridges, 29 A. 141; Le-Blanc vs. Perrault, 21 A. 26; Edwards vs. White, 29 A. 647; Hawley vs. Heyman, 28 A. 349; Laurent vs. Bulman, 80 A. 868; Ins. Co. vs. Packwood, 9 A. 74; Madden vs. Fielding, 19 A. 505; Waddell vs. Payne & Harrison, 28 A. 778; Fletcher vs. Henley, 18 A. 151; 9 A. 496; 6 L. 577.

2. Where judgment is one putting heirs in possession.

Dalton vs. Wickliffe, 35 A. 855; Succession of Lampton, 84 A.; Fuentes vs. Gaines, 25 A. 85; Arston vs. Arston, 15 A. 187; Sophie vs. Duplessis, 2 A. 274; Succession of Duplessis, 10 R. 198; but see Baron et al. vs. Administrator, 44 A. 295; Fowler vs. Succession of Gordon, 24 A. 270; Armstrong vs. Davis, 21 A. 419.

3. Where judgment is absolutely null and void for want of jurisdiction at time of signing judgment.

Warmsley vs. Robinson, 28 A. 793; D'Arcy vs. Ketchum, 11 How. 165; Hoyle vs. City R. R. Co., 28 A. 502; Webster vs. Reed, 11 How. 437; Champlin vs. Bakewell, 21 A. 353.

4. Where judgment is against unauthorized married woman.

White vs. Bird, 20 A. 281; Champlin vs. Lee, 19 A. 148.

5. Where judgment is against dead man *eo nomine*.

Edwards vs. Whited, 29 A. 647; E. R. Co. vs. Bosworth, 8 A. 80; McCloskey, Bigley & Co. vs. Wingfield & Bridges, 29 A. 141.

6. Question of jurisdiction always open, though judgment alleges jurisdiction.

Morris vs. Bailey, 15 A. 2; D'Arcy vs. Ketchum, 11 How. 163.

7. Judgment need not allege jurisdiction; it is presumed.

Graydon vs. Justus, 24 A. 224.

(E) Confession of judgment:

1. Merely authenticates agreement of parties.

Michie vs. Armat, 15 A. 225.

And does not bind third persons.

Bush & Goode vs. Chapin, 24 A. 277; Allison vs. Thomas, 29 A. 752; Carroll & Co. vs. Hamilton, 80 A. 522.

2. Confession of married woman: Not always binding; she may attack same.

Strother vs. Hamlet, 28 A. 840; Bains vs. Burbridge, 15 A. 628; Edwards vs. Edwards, 29 A. 600; Dancy vs. Martin, Cobb & Co., 28 A. 825.

3. Judgment may be rendered on confession of part of debt.

Conrad vs. Burbank, 24 A. 17; Stein vs. Brunner, 42 A. 772; Marbury vs. Pace, 29 A. 558.

4. Valid without citation or default.

Thornhill vs. Bank, 34 A. 1175; Woodward vs. Lurtz, 11 A. 38;
Toledano vs. Relf, 7 A. 61.

5. Who may confess judgment: President of police jury,
authorized by that body.

Parker vs. Scogin, 11 A. 622.

(F) Prematurity of judgment:

Judgment null if rendered before issue joined.

Braunsdorf vs. Fay & Masson, 13 A. 137; 7 N. S. 237; Ballard vs. Lee's
Administrator, 14 L. 214.

(G) Judgment against dead man eo nomine null and void:

Edwards vs. Whited, 29 A. 647; Succession of Hoggatt, 36 A. 337; McCloskey,
Bigley & Co. vs. Wingfield & Bridges, 29 A. 141; Railroad Co. vs. Bosworth,
3 A. 80; Norton vs. Jamison, 28 A. 102.

1. But where heirs or legal representatives are parties, judg-
ment valid.

Stackhouse vs. Zuntz, 41 A. 424.

2. Proceedings in succession of man proved to have been
living are null and void.

Burns vs. Van Loan, 29 A. 560.

(H) Silence of judgment is equivalent to rejection:

1. Of intervention.

Alex vs. Derbigny, 22 A. 335.

2. Of interest.

Saul vs. His Creditors, 7 N. S. 437; Succession of Anderson, 33 A. 331;
Keenan vs. Whitehead, 15 A. 333; Succession of Durnford, 1 A. 32.

But on appeal, where judgment accidentally omits inter-
est, it may be allowed without a rehearing.

Ealer vs. Lodge, 36 A. 115.

Or to strike out improper allowance of interest.

Dickson vs. Dickson, 36 A. 453.

3. Of attachment.

Givens vs. Caudle, 34 A. 1025.

Or privilege resulting from seisure.

Succession of Caldwell, 3 A. 42; Love vs. Voorhies, 13 A. 323.

4. Of reconvention.

Bauxet vs. Bauxet, 33 A. 671.

But see to the effect that case ought to be remanded.

Sientes vs. Odier, 17 A. 173.

5. Of rents and revenues in petitory action.

Villars vs. Falvre, 26 A. 898; Vascoeu's Widow vs. Parre, 14 L. 189;
 Brady vs. Ascension, 26 A. 821; McMichen vs. Morgan, 9 A. 209;
 Piloque & LeBeau vs. Perrett, 19 L. 824; Robertson vs. Penn, 8 L. 64.

6. Of claim for damages coupled with demand for recognition of ownership of slave.

Delatage vs. Pellerin, 8 M. 142.

Or on dissolution of injunction.

Elice vs. Garrett, 12 A. 755; Spencer vs. Banister, 12 A. 768; Robertson vs. Penn, 2 L. 62.

(I) Silence of judgment is not equivalent to rejection;**1. Of privilege flowing from nature of debt.**

Hill & Co. vs. Bourcier & Pond, 29 A. 845; Parker vs. Starkweather, 7 N. S. 840; Holmes vs. Holmes, 9 R. 118; Gustine vs. Union Bank, 10 R. 418; Robinson vs. Staples, 5 A. 712.

But *quoad* third persons, privilege has no existence if not mentioned in recorded judgment.

Nicholson & Co. vs. Bank, 27 A. 869.

2. Of solidarity of obligation.

Barns vs. Bidwell, 28 A. 296.

But not *quoad* third persons; judgment is restricted to its terms.

Graves vs. Hunter, 28 A. 183.

(J) Judgments binding only on parties thereto.

State ex rel. Bloomfield vs. Auditor, 28 A. 850; State ex rel. Lubie vs. Administrator, 27 A. 496.

(K) Merger into judgment:

Notes, drafts and other evidences of debt are merged into judgment.

R. R. Co. vs. Thornton, 12 A. 786; Abat vs. Buissan, 9 L. 418; Oakey vs. Murphy, 1 A. 872; Smalley vs. Creditors, 8 A. 886; Dennistown vs. Payne, 7 A. 888; 33 A. 886; Sturgis vs. Sheriff, 14 A. 227; 11 A. 616; Succession of Baily vs. Baily, 12 A. 565; 18 A. 681; Hair vs. McDade, 10 A. 584; 35 A. 510; Jones vs. Jamison, 15 A. 85; 9 A. 839; 25 A. 44; 25 A. 1083; 21 A. 283.

(L) Judgments confer no new rights; they merely confirm existing rights.

Kinder vs. Lyons, 28 A. 718; Thomas vs. Guilham, 25 A. 927; Succession of Anderson, 28 A. 581.

(M) No merger takes place to extinguish:

1. Unmatured portions of obligations.
Bynum vs. Gordon, 24 A. 160.
2. Mortgage which is recognized in judgment.
Lalanne vs. Payne, 42 A. 152; Montijo vs. Gordy, 38 A. 1113

(N) Prescription of judgments.

1. Prescribed in ten years from date of signature.
Payne vs. Furlow, 29 A. 160; Succession of Irwin, 33 A. 63; Succession of Rice, 15 A. 649.
2. Judgments which are not prescribed in ten years:
 - (a) Adjudication of community property to surviving parent.
Winter vs. Tournoir, 25 A. 612.
 - (b) Judgment for city taxes.
Succession of Mercier, 42 A. 1135.
3. But a judgment in favor of a tutor of minors is prescribed by ten years.
Wade vs. Caspari, 24 A. 211.
4. Though it has been held that prescription does not run against minor, except in specified cases.
Verret vs. Belanger, 6 A. 109; Calvitt vs. Mulholland, 12 R. 256.

(O) Date from which prescription against judgment runs:

1. Prescription runs from signing of judgment.
Ainsworth vs. Durrell, 21 A. 235; Walker vs. Succession of Hayes, 2 A. 177; Yale & Co. vs. Randle & Co., 23 A. 579; Drogree vs. Moreau, 23 A. 173; Dial vs. Patterson, 12 A. 720.
2. And pendency of appeal does not suspend prescription.
Byrne, Vance & Co. vs. Garrett, 23 A. 587; Succession of Hardy, 5 A. 490.
3. Prescription of separate action, based on domestic judgment, against heirs of deceased judgment debtor, runs from time of death.
Succession of Beckham, 16 A. 353.

(P) Judgments rendered in other States:

1. Final judgment of competent court after citation or hearing is valid in every State of the Union.
R. R. Co. vs. Thornton, 12 A. 733; Tipton vs. Mansfield, 10 L. 198; Briggs vs. Spencer, 3 R. 263; 7 Cranch 481; 3 Wheat, 234; Rowand vs. Jarvis, 5 A. 43; Lewis vs. Wilder, 4 A. 574; Hazard vs. Bank, 11 R. 335; McLaren vs. Kehler, 23 A. 80.
2. Whole record must be produced.
Clark vs. Hebert, 15 A. 279; Hockaday vs. Skeggs, 13 A. 632.

3. *Aliter* where isolated fact only is to be proved.

Stafford's Succession, 2 A. 886; Price vs. Emerson, 14 A. 141.

3. Validity of judgment tested by laws of State where rendered.

Kyle vs. Van Bibber, 7 A. 576.

5. Except where question is federal in nature, as in cases where judgment rendered *in personam* through substituted process on curator *ad hoc*.

Pennoyer vs. Neff, 95 U. S. 725; Laughlin vs. Ice Co., 85 A. 1184.

(Q) *Separate actions on judgment:*

Necessary in two cases:

(a) When judgment is foreign.

Succession of Beckham, 16 A. 862.

(b) When debtor in domestic judgment has died.

Succession of Rice, 15 A. 650; Reynolds vs. Horn, 4 A. 187.

(R) *Foreign judgment conclusive of issues presented and cause not reopened in suit on such judgment.*

Davis vs. Dugas, 11 A. 118; Lewis vs. Wilder, 4 A. 574; but see Turley vs. Dreyfus, 33 A. 885.

(S) *In suit instituted on notes, judgments on said notes obtained in another court may be substituted as cause of action by supplemental petition.*

Jones vs. Murphy, 18 A. 684; Wright, Williams & Co. vs. White, 14 A. 582.

(T) *Interpretation of judgments:***1. By pleadings and nature of obligations sued on.**

Barns vs. Bidwell, 28 A. 296; Rochelle's Heirs vs. Cox, 5 L. 287; Frall vs. Peet's Curator, 2 L. 282; Trepagnier vs. Williams, 4 L. 400; Bonvillain vs. Bourg, 16 A. 865; Feniston vs. Somers, 15 A. 679; Coons vs. Bertoulin, 44 A. 683.

2. By reference to jurisdiction of court.

Succession of Durnford, 1 A. 92; Copley vs. Robertson, 6 A. 181.

3. By reference to subject matter of controversy.

Succession of Regan, 12 A. 154.

4. All presumption in favor of judgment, *e. g.*, as based upon sufficient evidence.

Succession of Moore, 42 A. 832; Harrison Bros. vs. Creditors, 43 A. 92; Heffner vs. Hesse, 26 A. 148; Simmons vs. Howard, 23 A. 504; Bank vs. Bringier, 22 A. 118.

534. Judgment by Default—Judgment by default is

that which is given at the demand of one only of the parties to the suit, whether he be plaintiff or defendant.

C. P. 811, 860.

Where no citation, no valid default.

Marbury vs. Pace, 29 A. 557.

535. Judgment Contradictorily Rendered—Judgment contradictorily rendered is that which has been given after the parties have been heard, either in support of their claims, or in their defence.

C. P. 812.

No judgment on merits where exception only is on trial.

Hasard vs. Boykin, 8 R. 254.

536. Non-Suit, Not Res Judicata—If, after the cause has been set down on the docket for trial, the plaintiff does not appear, either in person or by attorney, to plead his cause, on the day fixed for trial, the defendant may require that judgment of non-suit be rendered against such plaintiff, with costs.

But such judgment can not be pleaded, as *res judicata*, or in bar of another suit, for the same cause of action, provided the plaintiff show that he has paid the costs of the first suit.

C. C. 2286; C. P. 491, 492, 552, 559.

(A) Non-Suit:

1. Law does not require judge to render non-suit on motion of plaintiff.

Yorke vs. Allen, 20 A. 287; Crocker vs. Turnstall, 6 R. 854.

2. Does not form *res judicata*.

Allinet vs. His Creditors, 15 A. 180; Bourg vs. Gerding, 33 A. 1369; 5 A. 166; 8 A. 660; 4 A. 176.

3. Interrupts prescription.

Locke vs. Barrow, 25 A. 118; 8 A. 453, 469; 10 A. 531; 7 A. 523; 11 R. 230; 8 L. 282.

4. But judgment dismissing without reservation is *res judicata*.

Bledsoe vs. Irwin, 33 A. 615.

5. Judgment of non-suit proper:

- (a) When plaintiff in main demand or defendant in re-conventional fail to prove their cases.

McClendon vs. Bennett & Addison, 18 A. 49; State ex rel. Henderson vs. Judge, 40 A. 22; McDonough vs. Dutillet, 8 A. 660; Dunbar vs. Manaker, 4 A. 176; Phillips vs. Cassidy & Powell, 88 A. 288.

- (b) Or where plaintiff fail to appear, and there is no re-conventional demand.

Saunders vs. Mangham, 42 A. 770.

- (c) Where plaintiff's right is in doubt.

Yorke vs. Allen, 20 A. 287; Lopez' Succession, 88 A. 368; Smith, Harris & Co. vs. Amacker, 15 A. 239; Succession of Hube, 20 A. 97; Succession of Townsend, 40 A. 81; Bennit vs. Cignoni, 41 A. 1147.

(B) Judgment of non-suit not proper:

1. When no trial could legally have been had.

Buchanan vs. Locke, 5 R. 211.

2. When case has not been set for trial.

Walton vs. Bank, 12 R. 99

3. Where there is reconventional demand, or what is equivalent thereto, such as damages in dissolution of injunction.

Ludwig vs. Kohlman, 5 A. 286.

4. When defendant has counter claims, etc.

Moch vs. Garthwaite, 11 A. 287.

(C) Payment of costs:

Where suit dismissed on defendant's exception, costs of first suit need not be paid before institution of second.

Howard vs. Copley, 10 A. 504.

(D) Appellate Court may order non-suit.

Golding vs. Steamer America, 20 A. 455.

537. Interlocutory and Final Judgments—Another distinction of judgments is into interlocutory and final.

(A) Interlocutory judgments, e. g.:

1. Overruling motion to dismiss.

State ex rel. Leche vs. Fowler, 42 A. 144.

2. Striking out reconventional demand.

State ex rel. Pfug vs. Judge, 85 A. 768.

3. Authorizing release on bond.

State ex rel. Roth vs. Judge, 87 A. 846.

(B) Entry on minutes not judgment.

Hartwell vs. Jumel, 80 A. 421.

(C) Form of judgment immaterial.

Succession of Carlon, 26 A. 830.

538. What Are Interlocutory Judgments—Interlocutory judgments do not decide on the merits; they are pronounced on preliminary matters, in the course of the proceedings.

See Cary vs. Richardson, 85 A. 505.

Interlocutory judgments need not be signed—such as :

1. Judgment dissolving attachment.

Wickman & Pendleton vs. Nalty, 41 A. 284; Watson vs. Simpson, 15 A. 709; Love, Savage & Co. vs. McComas & Cloon, 14 A. 201.

2. Judgment striking out reconventional demand.

Harris vs. Stockett, 85 A. 887.

3. Judgment on rule to show cause why property should not be sold for cash when purchaser fails to furnish 12 months' bond.

Fox vs. Tio, 1 A. 334.

4. Judgment homologating report of experts.

Marionaux vs. Marionaux, 28 A. 391.

5. Judgment on rule to bond.

State vs. Judge, 12 A. 455.

539. Definitive or Final Judgments—Definitive or final judgments are such as decide all the points in controversy between the parties.

Definitive judgments are such as have the force of *res adjudicata*.

C. C. 2285, 8556; C. P. 536, 565, 566.

Conditional judgments :

1. Courts may render conditional judgments if necessary.

State ex rel. Railroad Co. vs. Judge, 85 A. 220; Davidson vs. City of New Orleans, 84 A. 173, 174; Succession of DeBoisblanc, 82 A. 17.

2. When judgments are final.

Cary vs. Richardson, 85 A. 505; Harris vs. Stockett, 85 A. 888; Ruthenberg vs. Helberg, 48 A. 410; Woolfolk vs. Woolfolk, 80 A. 146; State ex rel. Poche vs. Judge, 42 A. 817; Fields vs. Gagne, 83 A. 889.

540. Mandates or Orders—Courts give mandates or orders, which, though they are not termed judgments, have nevertheless the same effect as judgments; such are mandates of arrest and of seizure.

*Orders which courts may render:***1. Executory process, which is not a judgment.**

Mitchell vs. Logan, 84 A. 998; State ex rel. Wise vs. Taylor, 82 A. 977; Rousseau vs. Bourgeois, 28 A. 186.

2. Orders for sale of property, which judge may modify in legal discretion.

Succession of Hebrard, 18 A. 496; Elders vs. Rogers, 11 A. 606; Thompson vs. Mylne, 9 A. 211; Stark vs. Burk, 9 A. 345.

541. Judgment Within Three Days After General Verdict—When the cause has been tried by a jury, and such jury have given a general verdict, the court must give judgment pursuant to the same, within three days from the time when such verdict has been entered on the records, unless a new trial has been granted.

C. P. 490, 546.

542. Where Verdict is Special—If it be a special verdict, the court shall have the same time for deliberation before giving judgment, as the law gives in cases which are tried by the court.

C. P. 490.

543. Reading in Open Court—All judgments must be read by the judge in open court.

C. P. 546, 565; R. S. 564.

*Judgments in vacation:***1. Illegal except where rendered by consent or pursuant to special law.**

Succession of Bougere, 29 A. 878; State ex rel. Dixon vs. Judge, 26 A. 119; 26 A. 74; Hernandez, vs. James, 23 A. 483; 29 A. 241; Simmonds & Co. vs. Leovy, 21 A. 806; 23 A. 483.

2. Curator can not give such consent.

Clacor vs. Lane, 5 A. 499.

3. When by consent valid, even as to third persons, except in cases of fraud and collusion.

City vs. Gauthreaux, 32 A. 1126; Morrison vs. Citizens' Bank, 27 A. 498;
Rust vs. Faust, 15 A. 477; Green vs. Reagan, 52 A. 974.

4. Orders which may be signed in vacation without consent.

(a) Executory process.

Rust vs. Faust, 15 A. 477; Folger vs. Roos, 40 A. 602; Mitchell vs. Logan, 34 A. 936.

(b) Arrest, attachment, provisional seizure, injunction and all orders connected therewith.

R. S. 1746; State ex rel. Syndic vs. Judge, 41 A. 590; Cummings vs. Archinard, 1 A. 279.

(c) Expropriation suits.

Act 132 of 1890, p. 174.

Formerly otherwise.

Telegraph Co. vs. Railroad Co., 29 A. 650; 16 A. 132.

(d) Preliminary orders for remedial writs from Supreme Court.

State ex rel. Behan vs. Judge, 35 A. 1076.

5. *Ex parte* orders usually invalid, e. g.—

(a) Order forfeiting charter of corporation.

State ex rel. Morey vs. Judge, 31 A. 323.

(b) Order fixing case continued indefinitely.

Hennen vs. R. R. Co., 20 A. 544.

But *aliter* when not required by any rule of court.

State vs. Floyd, 28 A. 553.

6. Judgments must be signed in open court—not in chambers:

Laurent vs. Beelman, 30 A. 363.

(a) Monition judgment.

Gay praying for monition, 20 A. 176.

(b) Injunction judgment.

Love vs. Banks, 3 L. 432.

7. Reasons for judgment should be given:

(a) But such reasons may be oral.

Beard vs. Simon & Renaud, 18 A. 271; Police Jury vs. Bowman, 11 A. 164; Gallot vs. McCluskey, 18 A. 259.

- (b) Simply "that law and evidence are in favor of" successful party is sufficient.

Hemken vs. Farmer, 8 R. 156; Powell vs. O'Neal, 24 A. 523; 86 A. 58; 87 A. 745.

- (c) Reasons given do not affect judgment if correct.

Seburn vs. Deyris, 25 A. 484.

544. Entering Judgments on the Records—All judgments, whether interlocutory, final, or definitive, must be correctly entered on the records, with the date of the day at which the same were rendered.

The same rule must be observed in relation to all orders or mandates given by the court, as well as to all motions made by the parties pending the suit.

C. P. 777.

Entry on minutes controls terms of judgments.

DeBlanc vs. LeBlanc, 15 A. 224.

But will not, when erroneous or irregular, annul judgment.

Robertson vs. Travis, 5 A. 402.

545. Recording Judgment in Mortgage Office—Definitive judgments, though entered on the docket of the judgments of the court, shall not hereafter affect the property of the person against whom such judgments have been rendered, all laws to the contrary notwithstanding. Such judgment must be recorded at the office of mortgages, in order to give the party a judicial mortgage, pursuant to the provisions of the law.

C. C. 5221, 5347; C. P. 722; R. S. 448, 474.

1. Names of defendants must be set forth in recordation, else no judicial mortgage results.

Ford vs. Tilden, 7 A. 533; Jartoux vs. Dupeire, 2 A. 608; Taylor vs. Hotchkiss, 2 A. 917; Graves vs. Hunter, 23 A. 132.

2. No mortgage results where judgment is—

- (a) For no specific sum, as judgment against tutor.

Gales vs. Christy, 4 A. 236; Timberlake vs. Brand, 5 A. 715; 10 A. 429.

- (b) Against city.

13 A. 502.

- (c) **Against insolvent after cession.**
Freeman vs. Creditors, 15 A. 397.
 - (d) **Against railroad company in hands of receiver.**
Bell vs. R. R. Co., 34 A. 793.
 - (e) **Against thing, or purely in rem.**
Herbert vs. Abbott, 39 A. 1112.
 - (f) **Ordering usufructuary to give bond.**
Succession of Dickson, 37 A. 795.
3. **Ordinarily, inscription of judgment confers mortgage.**
4 A. 254; 5 A. 225, 411, 631; 7 A. 543; 7 A. 60; 9 A. 336; 14 A. 871, 654.
 4. **Judgment of local court declaring foreign judgment executory operates judicial mortgage on recordation.**
Bonnate vs. Lane, 5 A. 225.

But foreign judgment is mere evidence of debt.
Turley vs. Dreyfus, 35 A. 510.
 5. **Judicial mortgage falls with judgment.**
Adams & Co. vs. Daunis, 29 A. 315.

546. Three Judicial Days Must Elope Before Signing, in Parish of Orleans; aliter in Country Parishes—The judge must sign all definitive or final judgments rendered by him, but he shall not do so until three judicial days have elapsed, to be computed from the day when such judgments were given; provided, that hereafter, (except in the parish of Orleans), all motions for new trials in causes, shall be made and determined, and all final judgments signed before the adjournment of the court, for the term at which such causes were tried, and whether three judicial days shall have elapsed or not.

C. P. 536, 541, 543, 558; R. S. 564.

1. **Final judgments must be signed, such as:**
 - (a) **Judgment on rule against sheriff to credit a writ with a certain sum.**
Leeds vs. Louisiana Manufacturing Co., 22 A. 16.
 - (b) **Judgment on rule erasing mortgages and privileges.**
Jacob vs. Preston, 31 A. 514.
 - (c) **Or holding sheriff liable for taking insufficient surety.**
Gates vs. Bell, 3 A. 62.

- (d) Or putting purchaser in possession.
State ex rel. Meux vs. Judge, 28 A. 451.
- (e) Judgment forfeiting recognizance.
State vs. Bouchon, 20 A. 894.
2. Judgment itself must be signed—not:
- (a) Reasons for judgment.
Chaffe & Bro. vs. Morgan, 80 A. 1807; Davidson vs. Carroll, Hoy & Co., 28 A. 108; Keane vs. Foster, 10 A. 261; Davis vs. Wilcoxon, 10 A. 640; R. R. Co. vs. Thornton, 12 A. 786; State ex rel. R. R. vs. Judge, 85 A. 219; 80 A. 68; 14 F. 878.
- (b) Minutes of court.
Hartwell vs. Jumel, 80 A. 421; State ex rel. Vignes vs. Judge, 48 A. 1169; Scott vs. Goodrich, 24 A. 269; Ex parte Nicholls, 4 R. 52; State vs. McDonald, 17 L. 485.
- (c) Order allowing remittitur.
State ex rel. Pfing vs. Judge, 85 A. 219; 84 A. 116; 80 A. 68.
3. Signature essential.
Succession of Millaudon, 28 A. 400; Jacob vs. Preston, 81 A. 514; Derbigny vs. Trepagnier, 12 A. 756; 3 A. 482; 5 A. 401; Marcal vs. Hooper, 27 A. 454; 20 A. 500, 511, 588; 24 A. 518; 23 A. 219; 21 A. 261; 23 A. 262; 3 A. 62; 7 R. 451.
4. Mandamus lies to compel signature.
State ex rel. Meux vs. Judge, 28 A. 451; R. R. Co. vs. Judge, 85 A. 219; 26 A. 119.
And to compel signature anew when illegally affixed in vacation.
State ex rel. R. R. Co. vs. Judge, 85 A. 219; State ex rel. Dixon vs. Judge, 26 A. 119.
5. *Supreme and criminal courts:*
Judgments need not be signed.
State vs. Thomas, 85 A. 1086; State ex rel. Pringle vs. Sheriff, 84 A. 1071.
6. Agreement of parties will not supply signature.
Executors of Bird vs. Bird, 28 A. 262; State ex rel. R. R. Co. vs. Judge, 85 A. 220; 84 A. 962.
7. Judgment may be signed by consent of parties by judge of one division of Civil District Court in absence of other judge.
State ex rel. Buisson vs. Judge, 88 A. 1426.
8. No appeal from unsigned judgment.
Saloy vs. Collins, 80 A. 63; State ex rel. Dixon vs. Judge, 26 A. 119.
9. Signature by clerk insufficient.
6 A. 200.
10. Signature must be dated.
Ex parte Nicholls, 4 R. 52.

11. Signing premature when motion for new trial is allowed or pending.

Converse, Harding & Co. vs. Bloom, 20 A. 535; Succession of Gilmore, 12 A. 562.

12. Judgment may be signed at next term *nunc pro tunc*.

State vs. Wyatt & Nicholls, 6 A. 701; Dorsey vs. Hills, 4 A. 107.

Appeal by motion allowed when judgment is signed at term when motion filed, though rendered at previous one.

Sackett, Grymes & Co. vs. Attaway, 11 A. 181.

13. Motion for new trial suspends judgment.

State ex rel. Allen vs. Judge, 35 A. 1107; State ex rel. Wentz vs. Judge, 35 A. 873; State ex rel. Newman vs. Judge, 32 A. 207; McWille vs. Perkins, 20 A. 168.

14. Parol inadmissible to impeach judgment.

Green vs. Reagan, 32 A. 274; Mann vs. Mann, 33 A. 332; 3 A. 631.

15. Tutor may require signature of judge to judgment accepting special mortgage.

15 A. 164; 13 A. 481, 483.

547. Amendment of Judgment—Judgments may be amended by the court, until after having been signed, in order.

1. **To Change Phraseology**—To alter the phraseology of the judgment, but not its substance;

2. **To Correct Clerical Errors**—To correct errors of calculation, as for instance, if more have been given than was demanded, or if the party in favor of whom the judgment was given had been ordered to pay the costs.

3. **Ex-officio New Trial**—Except in the cases above provided, courts can not alter their judgments; but they may, *ex officio*, direct a new trial in order to revise their judgments.

C. C. 8078; R. S. 8192.

(A) *Amendments of judgment, when allowed:*

1. To correct clerical error in name of defendant.

Shelly vs. Dobbins, 31 A. 530; Succession of Julia Corrigan, 42 A. 65.

2. To correct judgment as to verbiage, not as to substance.

Miller vs. Chandler, 29 A. 91; State ex rel. Vignes vs. Judge, 48 A. 1169; Succession of Byrne, 89 A. 521; 6 A. 548; 8 N. S. 892.

(a) But where ends of justice demand it, decree may be modified by judge *ex proprio motu*.

Gay vs. Hebert, 44 A. 802.

(b) No substantial change can be made under pretence of interpretation.

Ins. Co. vs. Harbor Protection Co., 89 A. 588.

(B) When not allowed:**1. After judgment has become final.**

Gay vs. Judges, 27 A. 214; State ex rel. Mahan vs. Bank, 28 A. 874.

2. Substantial amendment not permitted, but judge should grant new trial.

Miller vs. Chandler, 29 A. 91.

3. Ex officio order for new trial must be made within three days' delay.

Culberhouse vs. Marx, 88 A. 668.

(C) How amendment made:

By motion of party interested, duly served on other party.

Shelly vs. Dobbins, 81 A. 580; Miller vs. Chandler, 29 A. 91; La-croix vs. Bange 19 A. 88.

(D) Party complaining must prove errors.

Lee vs. Trahan, 20 A. 202.

548. Judgment is Property; No Alteration Without Consent—A judgment, when once rendered, becomes the property of him in whose favor it has been given; and the judge can not alter the same, except in the mode provided by law.

Judge can not *ex proprio motu* cancel judgment and render another.

State ex rel. Vignes vs. Judge, 48 A. 1169; Ballio vs. Wilson, 12 M. 868; Flint vs. Curry, 6 L. 69; Whipple vs. Hartzberger, 11 A. 478; Ins. Co. vs. Harbor Protection Co., 89 A. 588; State vs. Railroad Co., 7 R. 447; Converse, Harding & Co. vs. Bloom, 20 A. 555; Smith vs. Delahousaye, 9 R. 50.

549. Party Cast Pays Costs—In every case the costs shall be paid by the party cast, except where compensa-

tion has been allowed, or real tenders made, as heretofore provided by this Code.

C. C. 287; *Green vs. Garcia*, 8 A. 702; C. P. 1095, 369, 415, 907; *Williams vs. Galben*, 1 R. 94.

1. Costs follow judgment.

St. *Romain vs. Robeson*, 12 R. 194; *Kershand vs. Delahousaye*, 9 R. 77.

2. Defendant owes no costs until cast.

8 A. 702; *State ex rel. Roth vs. Judge*, 87 A. 846; *Fink vs. Martin*, 10 R. 147; 7 R. 77.

3. And in suits to remove public officers, citizens pay costs when defeated.

Act 135 of 1880, Sec. 10, p. 186.

4. Party cast in election suit pays costs.

Act 59 of 1880.

5. State gives no bond for costs, but when State is cast costs paid by Attorney General from appropriation.

Act 65 of 1884; *Succession of Taylor*, 83 A. 1271; *State vs. Taylor*, 34 A. 980.

6. United States government pays no costs.

2 Wheat. 535; 12 Wheat. 550; 5 How. 29.

7. By charter City of New Orleans exempt from giving bond for costs.

State ex rel. Samory vs. City of New Orleans, 34 A. 468.

8. But an administrator of one of the departments of city government not exempt.

State ex rel. Hoey & O'Connor vs. Brown, 29 A. 53; *State ex rel. George vs. Mount*, 21 A. 177.

9. Where proceedings *via executiva* converted into *via ordinaria*, plaintiff, though successful, pays costs of executory process.

Chew vs. Chinn, 7 N. S. 552; *Thompson vs. Howes*, 14 A. 45.

10. Party pays his own witness, and when cast is liable for fees and service of only six witnesses of adversary.

Smith vs. Trustees, 10 A. 582.

11. And liability for costs enforced not by separate suit but by execution.

Id.; 12 R. 194; 17 L. 269; 9 R. 17; 9 L. 77.

12. Costs, where not fixed by law, (*e. g.*, keeper's fees, charges for cultivation, etc.), are fixed on rule contradictorily with all parties in interest.

Learned vs. Walton, 42 A. 457.

13. Costs are paid:

- (a) By partnership; in suits between partners for settlement.

Burke vs. Fuller, 41 A. 741.

- (b) By estate of minor; costs of account and fees of attorney.

9 A. 122; 15 A. 88.

- (c) By community; in suits for divorce.

Eskolm vs. Bau, 84 A. 546.

- (d) And in suits for interdiction of one of the spouses.

Breaux, Fenner & Hall vs. Francke, 80 A. 838.

550. Costs in Incidental Demands—The same rule shall be observed, with regard to the party cast, on incidental demands, whether they be dilatory or declinatory.

C. P. 1085.

551. Costs Follow Judgment—If the court have not decreed in their judgment that the party cast should pay the costs, the same are nevertheless due to the party in whose favor the judgment had been given; and such party shall be entitled to have the same taxed, on execution of the judgment.

C. P. 155, 1085.

1. Party pays cost when cast on any issue.

Holzab vs. R. R. Co., 88 A. 185; *McCarthy vs. Baze*, 26 A. 882; *State vs. Hyland*, 86 A. 709; *State vs. Chapman*, 88 A. 849.

2. Even when costs of lower court would not have been on party cast.

Pacific R. R. Co. vs. Gay, 81 A. 438.

3. Garnishee provoking litigation responsible for costs.

Scooler vs. Alstrom, 88 A. 907.

4. Exceptional cases in matters of cost.

- (a) Costs of divorce proceedings charged to community.
Eskolin vs. Rau, 84 A. 546.
- (b) Costs of sustaining will fall upon estate.
Succession of Townsend, 40 A. 88; *Girard vs. Babineau*, 18 A. 608;
Sterling vs. Gros, 5 L. 107.
- (c) Costs of suit for settlement fall upon partnership.
Burke vs. Fuller, 41 A. 742.
- (d) Costs of expropriation suits paid by party expropriating.
R. R. Co. vs. Gay, 81 A. 433.
- (e) When both parties cast, each on his demand, costs of his own pleading paid by each.
Peniston vs. Somers, 15 A. 679; *Carroll vs. Harper*, 11 A. 214.

5. Costs of appeal not borne by appellee:

- (a) When he offered to permit appellant to have corrected the only item in the judgment on which he is cast on appeal.
Oteri vs. Oteri, 87 A. 74, 76; *Kohn vs. Schooner Renaissance*, 5 A. 26; *Baudoin vs. Tete*, 10 A. 60.
- (b) When result of appeal is merely to strike out irrelevant matters, leaving practical effect the same.
Succession of Gaines, 38 A. 124.

6. Judgment taxing costs not separately appealable from main judgment.

Iron Works Co. vs. Reuss, 40 A. 121.

7. State pays no costs even when cast, but Attorney General pays from appropriation.

Succession of Townsend, 40 A. 66; *State vs. Taylor*, 33 A. 1272; *State vs. Taylor*, 84 A. 978.

8. Security for costs, Act 99 of 1877. Security demandable from plaintiff, not defendant; not even for reconvention.

State ex rel. Nelson & Poppleton vs. Judge, 26 A. 227.

9. And no costs are to be paid by appellee until condemnor.

State ex rel. Butler vs. Judge, 30 A. 599.

552. What Costs Are Taxed—The costs to be paid by the party cast include not only the taxed costs, but also all the expenses incurred in taking testimony by

commission, and the compensation allowed for their services to such experts, auditors, or judicial arbitrators, as may have been appointed in the suit; and also the costs of copies of notarial acts, of judgment, and other copies of the records of other public officers, necessary in the cause.

C. C. 3198; C. P. 155, 462, 1095.

1. Judge's approval of bill of costs of court officers *prima facie* proof of correctness.

Shaw vs. Howell, 18 A. 195; Parker vs. Robinson, 14 A. 246; City vs. Patton, 27 A. 169.

2. Court officers collect costs every six months. Law allowing this does not apply to experts, etc., who must await termination of suit.

In re City, etc., 19 A. 882; Lobdell vs. Bushnell, 27 A. 894; Fink vs. Martin, 10 R. 150.

3. What term "costs" includes:

(a) Compensation allowed experts, auditors, and judicial arbitrators, which need not be paid until termination of suit.

19 A. 882; Lobdell vs. Bushnell, 27 A. 894.

(b) Costs of copies of acts in executory process.

Cumming vs. Archinard, 1 A. 279.

4. Fees of appraisers in successions fixed by Act 83 of 1878; but this does not apply to expert appraisers in other cases.

Mullan vs. Creditors, 39 A. 899.

5. As to costs of sheriff not provided for in fee bill.

Witkowski vs. Witkowski, 16 A. 283.

6. Evidence of costs in executory process. Need not be by authentic act.

Umrich vs. Grow, 24 A. 808.

7. Expenses not part of taxable costs:

(a) Briefs.

Oline vs. Railroad Co., 42 A. 85.

(b) Fees of keeper when keeper not necessary.

City vs. Farlange, 25 A. 883.

(c) Expenses of attending court.

12 A. 714.

553. Interest on Judgment—Interest shall not be allowed by the judgment, unless the same have been expressly claimed, and then only in cases in which the law permits such interests to be stipulated.

C. P. 522.

Interest not claimed not allowed.

Brown vs. Besson, 20 A. 735; 10 A. 485; *McIntyre vs. Hall*, 20 A. 217; *Mil-laudon vs. Percy*, 9 L. 445; *Bank vs. Forchess*, 9 L. 477.

554. Rate of Interest—Interest at the rate of five per cent. shall be allowed on all debts from the time they become due, unless otherwise stipulated.

C. C. 1986, 2054, 2924.

Judgment not a debt and interest can not be collected on it unless judgment allows it.

Succession of Anderson, 23 A. 582; *Saunders vs. Taylor*, 7 N. S. 14; *Saul vs. Creditors*, 7 N. S. 437; *D'Aquin vs. Condon*, 8 N. S. 608; *Succession of Regan*, 12 A. 112; *Cochrane vs. Murphy*, 4 A. 6; *Hill vs. Bourcier*, 29 A. 841; 10 R. 410, 155; 9 R. 119; 18 L. 414; see *Roper vs. Magee*, 12 A. 409.

555. Judgments Take Effect from Last Day of Term—Exception—All judgments rendered, except in the first judicial district, shall be considered as having effect only from the last day of the term, whatever may be the day on which they shall have been signed.

1. Finality of judgments of Supreme Court.

C. P. 911, 912.

2. Final in country three judicial days from rendition

State ex rel. Fairchild vs. Stillman, 31 A. 162.

3. Above article does not apply to recordation of judgments which operate as judicial mortgages from moment of recordation, irrespective of finality of judgment *quoad* appeal and execution.

Chaffe & Sons vs. Walker, 39 A. 35; *Wolfe vs. Joubert et al.*, 45 A. 1100; see Act 143 of 1898.

4. Prescription of judgment runs only from last day of term.

Broussard vs. Dupre, 29 A. 518; *Boyd vs. Labranche*, 35 A. 235.

5. Act 143 of 1888, p. 198, amends and re-enacts Art. C. C. 3322 as follows: "The judicial mortgage takes effect from the day on which the judgment is recorded in the manner hereafter directed; provided, that judgments, the parish of Orleans excepted, rendered at any term of court shall have no effect to create a judicial mortgage as between judgment creditors, until from the day of adjournment of the term at which the same was rendered, although recorded prior to the adjournment of said term."

CHAPTER VI.

OF THE MODE IN WHICH DEFINITIVE JUDGMENTS MAY BE REVISED, MODIFIED OR REVERSED.

556. Revision of Judgments—Definitive judgments may be revised, set aside or reversed:

1. By a new trial.
2. By appeal.
3. By action of nullity.
4. By rescission.

This last mode can only be exercised by minors, or persons who were absent when judgment was rendered against them.

SECTION I.

Of New Trials.

557. New Trial—The court may revise their judgment by granting a new trial, in the cases hereafter provided.

558. Within Three Judicial Days, but Before Adjournment—The party who believes himself aggrieved by the judgment given against him, may, within three judicial days after such judgment has been rendered, pray for a

new trial, which must be granted, if there be good ground for the same; provided, that said new trial shall be prayed for and passed before the adjournment of the court.

C. P. 546.

1. Application for new trial in time:

(a) After three judicial days if judgment has not been signed.

Johnson vs. Gennison, 20 A. 511; Labatt vs. Duruty, 20 A. 583; McWillie vs. Perkins, 20 A. 168; Succession of Carraby, 23 A. 110; Citizens' Bank vs. Bellocq, 19 A. 376.

(b) Where judgment has been prematurely signed.

State ex rel. Allen & Syme vs. Judge, 35 A. 1104; State ex rel. Wintz vs. Judge, 35 A. 873; State ex rel. Newman vs. Judge, 32 A. 207; Succession of Carraby, 23 A. 110.

2. After delay has expired, judge can not grant new trial *ex proprio motu*.

Culverhouse vs. Marx, 33 A. 667.

3. Discretion of court in matters of new trial. It must be legal discretion.

8 N. S. 100; 4 N. S. 132; Gale vs. Kemper's Heirs, 10 L. 209; 8 A. 92; 14 A. 374; 11 A. 606; 10 A. 766; State vs. Washington, 36 A. 342; State vs. White, 35 A. 96; State vs. Baird, 34 A. 105; State vs. Hunt, 4 A. 436; State vs. Long, 4 A. 441; 33 A. 882.

But when good reasons given, new trial must be given.

Wilkins vs. Baton Rouge, 10 R. 57; Adams vs. Webster, 25 A. 113.

4. Court may *ex officio* order new trial.

Gale vs. Kemper's Heirs, 10 L. 209.

5. Premature signing of judgment can not defeat seasonable notice for new trial.

Succession of Carraby, 23 A. 110; McWillie vs. Perkins, 20 A. 168; Rhodes vs. Scholfield, 6 A. 251; Fretz vs. Carlile, 4 A. 561; State ex rel. Allen & Syme vs. Judge, 35 A. 1106; Succession of Gilmore, 12 A. 563.

But remedy is by appeal when judgment timely signed.

Succession of Carraby, 23 A. 110; 9 R. 50; 6 L. 69.

6. Mandamus does not lie to compel judge to sign judgment pending motion for new trial.

State ex rel. Wintz vs. Judge 35 A. 873.

7. Action on motion for new trial may be postponed to subsequent term of court by consent of parties.

State ex rel. Allen & Syme vs. Judge, 35 A. 1106.

559. Rule for New Trial—The party demanding a new trial must set forth the grounds on which he rests his demand, and the same must be filed, entered on the records of the court, and notified to the adverse party, in order that he may answer within the delay prescribed for answering.

C. P. 180.

560. New Trial Granted—When—A new trial shall be granted.

1. Contrary to Law and Evidence—If the judgment appear clearly contrary to law and evidence.

2. Newly Discovered Evidence—If the party has discovered, since the trial, evidence important to the cause, which he could not, with due diligence, have obtained before.

3. Bribery or Misconduct by Jury—If the cause has been tried by a jury, and it be shown that the jury has been bribed, or has behaved improperly, so that impartial justice has not been done in the cause.

(A) Grounds for new trial.

See *Robinson vs. Howell*, 22 A. 524; *Stone vs. Rose*, 2 A. 225.

1. Newly discovered evidence:

Character of evidence. It must be:

(a) Not mere cumulative evidence.

State vs. Hyland, 86 A. 710; *State vs. Fahey*, 85 A. 9; *State vs. Alvarez*, 7 A. 284; *Peniston vs. Railroad Co.*, 84 A. 781.

(b) Material.

State vs. Clark, 8 R. 538; *State vs. Hornsby*, 8 R. 554; *State vs. Kennedy*, 8 R. 590; *State vs. Johnson*, 80 A. 805; *State vs. Fahey*, 85 A. 12.

2. Not merely to impeach credibility of witness.

State vs. Fahey, 85 A. 10; *State vs. Diskin*, 85 A. 48; *State vs. Young*, 84 A. 246.

3. New evidence not known previously to defendant.

State vs. Edwards, 84 A. 1012; *State vs. White*, 85 A. 96; *State vs. Cotten*, 85 A. 981; *Doat vs. Maltby*, 2 A. 583.

(a) Uncorroborated affidavit of party not sufficient.

State vs. Edwards, 34 A. 1018; 21 A. 473; 22 A. 468; 14 A. 79; 14 A. 40;
State vs. Cotten, 36 A. 981; 7 A. 284, 532; 4 A. 428, 441.

(b) Due diligence must have been used.

Peck vs. Chapman, 16 A. 367; Wolfe vs. Pruitt, 7 A. 572; Pahnvits
vs. Fassman, 2 A. 626; Bounet vs. LeGrass, 1 R. 93; Succession
of Coste, 43 A. 124.

4. New evidence must be admissible under the pleadings. Thus where motion for new trial alleges adultery of wife (suit being for separation), motion will be denied when adultery is not charged in answer or reconventional demand.

Cass vs. Cass, 34 A. 612; 19 A. 491.

(B) Bribery and misconduct of jury.

1. Mover for new trial must annex affidavit of facts proving bribery.

Morgan vs. Bell, 4 M. 619; Trehan vs. McManus, 2 L. 216.

(a) And though generally juror can not impeach his own verdict.

Campbell vs. Miller, 1 N. 514; Clive vs. Rightor, 11 L. 141; State vs. Caldwell, 3 A. 435.

Yet juror may be sworn as to bribery.

Hawkins vs. Printing and Publishing Co., 29 A. 140.

(b) Case remanded for new trial may be on all issues, original and supplemental, where Supreme Court decided nothing.

Eskridge vs. Farrar, 34 A. 718, 719.

(c) But issues set at rest by decision of Supreme Court will not be reopened on new trial.

Boisse vs. Dickson, 32 A. 1150; Burbank vs. Harris, 30 A. 487; Succession of Arick, 23 A. 611.

(C) New trial should not be refused if judgment incorrect merely with a view to allow Supreme Court to pass upon the case.

Adams vs. Webster, 25 A. 173.

(D) Motion for new trial in time if judgment has not been presented for signature, though more than three days elapsed from rendition.

Citizens' Bank vs. Bellocq, Noblom & Co., 19 A. 376; Smelser vs. Williams, 4 R. 152; 20 A. 511, 533, 168; 23 A. 110; 5 N. S. 320.

(E) New trial will be granted:

1. To correct premature signing of judgment.

23 A. 110.

2. When proper affidavit made and case otherwise warrants it.

Robinson vs. Howell, 22 A. 524.

8. When verdict of jury erroneous, and judge should not sustain verdict simply to send case to Supreme Court.

Adams vs. Webster, 25 A. 118.

(F) New trial will not be granted—on sole ground that:

1. Judge was legally recusable, though no plea of recusation was filed.

Ricks vs. Gantt, 35 A. 920.

2. Party was taken by surprise by loss of expected evidence. He should have asked a continuance.

McClure vs. King, 15 A. 220.

3. Case was called in absence of counsel.

Anderson vs. Arnette, 27 A. 287.

4. Witnesses were not present; when they were not summoned, and when no affidavit is made of their names or expected testimony.

Peck vs. Chapman, 16 A. 867.

5. Counsel misunderstood remark of judge.

Mann vs. Mann, 38 A. 352.

6. Defendant did not see the account which he admitted to be correct.

Looney vs. Levy, 35 A. 1014.

561. When New Evidence, or Bribery or Misconduct of Jury, Alleged—Affidavit, etc.—If a new trial be prayed for on the ground of new evidence having been discovered, or on account of bribery or misconduct of the jury, or of the adverse party, the party praying for the new trial must, on filing his motion, annex to the same his affidavit of the facts alleged in proof of the bribery, or misconduct of the jury, or his having discovered the evidence material to his suit since the judgment was rendered, although he had used every effort and diligence in his power to procure the necessary testimony.

This affidavit must be filed in the records, in order that the adverse party may have communication of the same.

*When affidavit required:***1. In case of bribery or misconduct.**

Morgan vs. Bell, 4 M. 619; *Trehan vs. McManus*, 2 L. 216; *Hawkins vs. Printing Co.*, 29 A. 189; *Paquetel vs. Gauche*, 17 A. 63.

(a) And jurors may be sworn.

Id.

(b) In other cases jurors can not impeach their verdict.

Campbell vs. Miller, 1 N. S. 514; *Clive vs. Eighor*, 11 L. 141; *State vs. Caldwell*, 8 A. 435.

2. In cases of newly discovered evidence.

Colvin vs. Nelson, 4 A. 544; 7 L. 84; 10 L. 571; 1 R. 92; *Union Bank vs. Robert*, 9 R. 177.

3. Judge should hear evidence on motion for new trial on ground that jury were illegally and improperly influenced.

Higgins vs. Haley, 26 A. 389.

4. In jury cases, motion for new trial should always be filed.

Hughes vs. Lee, 8 R. 429; 17 L. 841; 5 L. 446; *Carter vs. Caldwell*, 15 L. 491.

562. Affidavit Not Necessary—When—No affidavit is necessary when a new trial is prayed for on the ground of the judgment being contrary to law and the evidence.

563. Evidence on New Trial—The court shall decide summarily on such applications. If a new trial be granted, the cause shall again be set on the docket; and on the new trial the parties shall not be precluded from producing new proofs, on the ground of the same not having been offered on the first trial.

SECTION II.

Of the Appeal and Statement of Facts.

564. What Is Appeal—An appeal is the act by which one of the parties to a suit has recourse to a superior tribunal, in order to have the judgment of an inferior court corrected.

C. P. 482, 548, 570, 578, 582, 589, 590, 594, 901.

(A) Appeal constitutional right.

It must not lightly be denied.

State ex rel. Durand vs. Judge, 80 A. 286; Allen, Nugent & Co. vs. Carey, 52 A. 1125; State ex rel. Straus vs. Dubuolet, 25 A. 161; DeGruy vs. Aikens, 48 A. 533; Gilmore vs. Brenham, 1 A. 414.

(B) Remedy by appeal often excludes other remedies, such as:

1. *Injunction.* Sufficiency of evidence to justify *flat* in executory process can not be examined on injunction but only on appeal.

Latiolais vs. Bank, 33 A. 53; City of Shreveport vs. Flournoy, 26 A. 709; Hall vs. Egelly, 35 A. 818; Talliaferro vs. Steele, 14 A. 656; Sartorius vs. Dawson, 18 A. 111; Hernandez vs. James, 28 A. 485.

2. No appeal lies where remedy is by injunction, as where judgment is rendered perpetuating *rulo* taken to show cause why property should not be sold.

State ex rel. McCloskey vs. Judge, 80 A. 233.

3. *Prohibition.* No prohibition where remedy is by appeal.

State ex rel. Hernandez vs. Monroe, 33 A. 923; State ex rel. Gullett Gin Mfg. Co. vs. Judge, 84 A. 762; State ex rel. Sinnot vs. Judge, 82 A. 553; State ex rel. Berthoud vs. Judge, 84 A. 782; State ex rel. Follette vs. Judge, 82 A. 1185; State ex rel. Gill vs. Tissot, 84 A. 90; State ex rel. New Orleans vs. Judge, 26 A. 750; State ex rel. D'Meza vs. Judge, 21 A. 123; State vs. Judge, 11 A. 686; State vs. Judge, 8 A. 92.

4. *Mandamus.* Refusal to grant injunction and sequestration must be remedied by appeal, not by *mandamus*.

State ex rel. Wise vs. Taylor, 82 A. 978; State ex rel. New Orleans vs. Judge, 82 A. 549; State ex rel. Padron vs. Judge, 81 A. 794; State ex rel. Beebe vs. Judge, 28 A. 905; State ex rel. Halphen vs. Hudspeth, 83 A. 97; State ex rel. Gill vs. Tissot, 84 A. 90; State ex rel. Horscher vs. Judge, 33 A. 268; State ex rel. R. R. Co. vs. Judge, 36 A. 895; State ex rel. Luminals vs. Judge, 34 A. 1114; State ex rel. Logan vs. Judge, 16 A. 185.

But where suspensive appeal from order refusing injunction would be ineffectual, *mandamus* lies to compel granting of injunction.

State ex rel. Murray vs. Judge, 36 A. 582.

5. *Certiorari.* Insufficiency of evidence to justify judgment examined on appeal—not on *certiorari*.

State ex rel. Kramer vs. Judge, 32 A. 219; State ex rel. Wintz vs. Judge, 82 A. 1223; State ex rel. Webre vs. Skinner, 52 A. 1092.

6. Nullity of judgment. No action of nullity lies where relief attainable by appeal.

Esterbrook vs. Gallier, 27 A. 37; *Blank vs. Speeman*, 23 A. 146; *Taliaferro vs. Steele*, 14 A. 456; *Gilmore vs. Gilmore*, 9 A. 203.

7. And where relief might have been obtained had party appealed.

Swain vs. Sampson, 6 A. 799; *Norris vs. Fristoe*, 3 A. 646.

(C) Appeals in suits by laborers.

Act 25 of 1874.

(D) Appeals to Supreme Court. Terms and appeals thereto.

1. Civil cases.

See Act 69 of 1884 amending Act 5 of 1880; Act 45, E. S., 1870.

2. In contested election cases.

Act 129 of 1877, E. S., p. 197.

3. Criminal cases.

See Act 1876, p. 56; Act 30 of 1878; 41 A. 953; 40 A. 618; 36 A. 865.

(E) Issues on appeal.

1. Issues involved only in judgment appealed from considered.

31 A. 436, 521, 741; 33 A. 1404; 35 A. 555; 30 A. 1255; 14 A. 49; 42 A. 234; 41 A. 465, 904; 42 A. 77, 846; 35 A. 318; 17 A. 126, 714.

2. Thus appeal from judgment on merits alone will not bring up attachment previously dissolved.

Givens vs. Caudle, 34 A. 3; 4 A. 1025; *Ikerd vs. Postlewaite*, 34 A. 1236.

3. Thus, in consolidated suits, appeal should be from judgment in case as consolidated.

Vasocou vs. Woodward, 35 A. 555.

4. If case not consolidated before judgment, appeal should be from the several judgments therein rendered.

Succession of Clairteux, 35 A. 1178.

(F) Effect of appeal as to jurisdiction of lower court:

Lower court still has power:

1. To pass upon sufficiency of bond.

Baker vs. Schultz, 35 A. 524; *Dumas vs. Mary*, 29 A. 806; *Weiser vs. Blasse*, 34 A. 833; *Happenbauer vs. Durlin*, 25 A. 739; *State ex rel. Gill vs. Tiesot*, 34 A. 98; *State ex rel. Fairex vs. Judge*, 33 A. 925; *State ex rel. Simonds vs. Judge*, 21 A. 178.

2. To increase amount of bond fixed too low whether amount suggested by appellant or not.

Demarest vs. Beirne, 36 A. 751; *Holbrook vs. Holbrook*, 32 A. 13; *Gibson vs. Selly*, 2 A. 628; *Fink vs. Martin*, 10 R. 152; *Glover vs. Taylor*, 38 A. 634; 3 R. 78; but see *Barrow vs. Clack*, 45 A. 481; 1 R. 527.

8. To rescind appeal inadvertently allowed where none is permitted.

Fairex' Case, 33 A. 927; *State ex rel. Clentat vs. Judge*, 32 A. 816; 32 A. 1168.

4. To pass upon sufficiency of surety.

Barrow vs. Clack, 45 A. 433; *Succession of Charmbury*, 34 A. 21; *Vredenbery vs. Behan*, 32 A. 475; *Perillat vs. Fernandez*, 16 A. 192; *Stanton vs. Parker*, 2 E. 551; *State ex rel. Gausson vs. Judge*, 21 A. 44; *Edwards vs. Edwards*, 29 A. 597; *State vs. Judge*, 24 A. 528; *Baker vs. Schultz*, 45 A. 524; *State ex rel. Beebe vs. Judge*, 23 A. 81; *State ex rel. Kane vs. Judge*, 23 A. 279; *Gill vs. Judge*, 34 A. 91.

5. To grant appeal to other parties, such as an appellee wishing to modify judgment as to co-appellee.

Levy vs. Collins et als., 32 A. 1003.

6. To compel clerk to make transcript; appellate court will not entertain a rule on clerk where issues of fact are raised.

State ex rel. Cass vs. Clark, 33 A. 422; *Morrison vs. Lynch*, 36 A. 611.

7. To hear branches of case not affected by appeal, as where it proceeds to hear *merits* pending suspensive appeal from judgment rendered on rule *nisi dissolving preliminary injunction*.

State ex rel. Butchers' Union, etc., vs. Judge, 33 A. 436.

Or pending appeal from judgment appointing a liquidator for a partnership.

State ex rel. Wood vs. Judge, 27 A. 702

8. To issue second order of appeal to same appellant when first was illegal.

Jackson vs. Michie, 33 A. 723.

9. To determine whether appeal is devolutive or suspensive.

State ex rel. Gausson vs. Judge, 21 A. 44; 34 A. 90; 32 A. 814; *Barthet vs. Houston*, 37 A. 852.

10. To try issues of fact arising after appeal, as question of interest *vel non* of third party appealing.

Succession of King, 21 A. 502.

11. To issue sequestration in proper cases.

McFarlane vs. Richardson, 1 A. 12; *Williams vs. Duer*, 14 L. 536.

(G) *Lower court has no power:*

1. To rescind appeal after bond filed and all legal requisites fulfilled.

State ex rel. R. R. Co. vs. Judge, 39 A. 774; *State ex rel. Irwin vs. Judge*, 36 A. 192; *State ex rel. Kramer vs. Judge*, 30 A. 1014; *State ex rel. Ribet vs. Judge*, 27 A. 684; *State ex. rel. Beebe vs. Judge*, 23 A. 81; *State ex rel. Stackhouse vs. Judge*, 21 A. 152.

2. To execute sentence on prisoner when proper appeal taken.

State ex rel. Notal vs. Judge, 37 A. 327.

3. To fix fees of curator.

State ex rel. Trustees of Blind vs. Judge, 30 A. 1026.

4. To issue execution when appeal is suspensive, or *contra*, when appeal is devolutive.

Duncan vs. Wise, 39 A. 74; State ex rel. Mahan vs. Judge, 26 A. 686; Smelser vs. Blanchard, 15 A. 234; Lottspeich vs. Diboll, 28 A. 772.

5. To extend return day of appeal.

DeBouchel vs. Her Husband, 34 A. 102.

6. To determine question of nullity *vel non* of appeal.

State ex rel. Dubuclet vs. Judge, 24 A. 600; State ex rel. Silverstein vs. Judge, 26 A. 622; State ex rel. Elbet vs. Judge, 27 A. 684.

- (H) *Writ of prohibition issues to restrain proceedings in lower court after a perfected appeal.*

State ex rel. Graham vs. Judge, 24 A. 589; State ex rel. Dubuclet vs. Judge, 24 A. 600.

- (I) *Lower courts can not annul or revise judgments of Supreme Court.*

State ex rel. Heirs of Gee vs. Drew, 38 A. 274; State ex rel. Bank vs. Mayer, 35 A. 406; Lovelace vs. Taylor, 6 R. 92; Cox' Executors vs. Thomas, 11 L. 366.

- (J) *Party must appeal in capacity in which judgment is rendered against him.*

Thus, he can not appeal as tutor from judgment against him individually.

Tutorship of Heirs of Byland, 33 A. 756; Thibodeaux vs. Thibodeaux, 45 A. 1126.

- (K) *No change of judgment as between appellees.*

Bowman vs. Kaufman, 30 A. 1021; Leeds & Co. vs. Jones, 37 A. 427; Vance vs. Vance, 31 A. 186; Payne vs. Anderson, 35 A. 977; Succession of Herron, 32 A. 835; 18 A. 265; 16 A. 196; 15 A. 433; 28 A. 522; 20 A. 121.

- (L) *Necessary parties to appeal:*

All those parties to the suit who have interest in the judgment should be made parties to the appeal, thus:

1. *Garnishee* necessary party where plaintiff in execution obtains judgment against him and defendant appeals.

Copley vs. Snow, 3 A. 623; Gibson vs. Selby, 3 A. 319; Reese & Ellis vs. Conyers, 16 A. 40.

2. *Garnishee*, when plaintiff appeals from judgment dismissing attachment begun by garnishment.

Robinson vs. Miller, 14 A. 219; Condon vs. Samory, 12 A. 301.

3. *Garnishee*, when judgment in favor of third person claiming funds in garnishee's hands.

Reese vs. Ellis, 16 A. 39; Copley vs. Snow, 3 A. 638.

But *judgment debtor* not necessary party where appeal is between creditor and garnishee.

Elder vs. Rogers, 11 A. 606; Marqueze vs. LeBlanc, 29 A. 208; Katz & Barnett vs. Sorsby, 34 A. 590.

4. *Defendant*, in appeal by third person.

State vs. Wickliffe, 21 A. 755; Esconbas vs. Calcasieu Mining Co., 33 A. 484.

5. *Syndic and creditors of insolvent*, when opposition to homologation of account of syndic dismissed.

17 A. 802; Rosenthal vs. Creditors, 35 A. 618; 12 A. 755; 8 A. 868; Beer & Co. vs. Creditors, 12 A. 774.

3. *Creditor*, when appeal by syndic or other creditor from judgment securing privilege or mortgage on tableau.

7 N. S. 447; 15 L. 862; Garcia vs. Creditors, 8 R. 488.

7. *Both defendants*, members of commercial firm.

Hammit vs. Payne & Co., 27 A. 400; Overruling Lambert vs. Vawter, 6 R. 181; Saux vs. Lefebvre, 12 A. 757; Tupery vs. Lafitte, 19 A. 298.

8. *Husband*, where wife is party.

Lanoue vs. Reed, 7 L. 112; Reese vs. Conyers, 16 A. 40.

9. *All parties to record interested in maintaining judgment*.

Cummings vs. Irwin, 14 A. 815; Armstrong vs. Creditors, 8 A. 868; 12 A. 775; 11 A. 409; 10 A. 574; 20 A. 83; 18 A. 281; 21 A. 209; 16 A. 78; Hewson vs. Creswell, 10 A. 232; Lobelle vs. Lobelle, 5 A. 174; Swearingen vs. McDaniel, 12 R. 206; Succession of Perry, 4 A. 577.

10. *Intervening parties* as well as original.

12 R. 208.

11. *Third persons called as warrantors*.

Armant vs. Bourgeois, 19 A. 70; Olivier et al. vs. Williams, 12 R. 180; 9 A. 98, 485; 9 L. 473.

12. *All parties required below, e. g. all joint obligors though only part appeal*.

Drew vs. Atchison et al., 3 R. 140; 5 A. 174; Duggan vs. DeLizardi, 5 R. 224.

But as to heirs.

See Ellery vs. Dameron, 18 A. 109; Stevenson vs. Edwards, 27 A. 808; Burke vs. Erwin's Heirs, 6 L. 520; Farrar vs. Newport et al., 17 L. 346.

13. *Vendor of defendant* sued by transferee of instalments due for price of land when defendant pleads deficiency in quantity of land and claims diminution of price.

Moore vs. Rutherford, 8 R. 60.

14. *Vendor and vendee* in revocatory action or simulation.

Trounastine vs. Ware, 39 A. 939.

15. Parties to petition.

Gay vs. Marionneaux, 20 A. 556; Ventress vs. Brown, 30 A. 1012.

16. Creditors who have been paid, in appeal from homologation of administrator's account.

Succession of Treadwell, 38 A. 260; Ondon vs. Samory, 12 A. 301; Broussard vs. Robin, 13 A. 560; Cummings vs. Erwin, 14 A. 315.

17. *Maker and endorser of note* when judgment rendered against both.

Sittig vs. Little, 21 A. 646.

18. All defendants condemned *in solido*.

Cotton vs. Stirling, 10 A. 137.

19. *Plaintiff and surety on injunction bond* when damages are allowed on dissolution.

Pecoul vs. Perret, 20 A. 70; 4 A. 514; 3 A. 318; 12 E. 203; 4 A. 577; 11 A. 489; 10 A. 347; Avegno vs. Johnson, 22 A. 400; Battalora vs. Erath, 25 A. 318; Bethancourt vs. Stephens, 19 A. 291.

20. Creditors on tutor's account when appeal is from judgment homologating.

Tutorship of Smith, 21 A. 133.

21. Estate, when heirs appeal from judgment recognizing claim of creditor.

Milttenberger vs. Estate of Piper, 23 A. 267.

(M) Not necessary parties to appeal:

Those who are not interested in maintaining judgment appealed from need not be made parties. Thus:

1. Judgment debtor in appeal from judgment between creditor and garnishee in garnishment under *fi. fa.*

Elder vs. Rogers, 11 A. 606; Marqueze vs. LeBlanc, 29 A. 203; Katz & Barnett vs. Sorsby, 34 A. 590.

2. Nominal party, as sheriff in injunction restraining execution.

Boquille vs. Faillie, 1 A. 204; Francis vs. Scott, 5 A. 668; Boykin vs. O'Hara, 6 A. 115; Eschert vs. Harrison, 29 A. 360; Hobgood vs. Brown, 2 A. 523.

And where sheriff is mere stakeholder of funds to be distributed.

Bank of America vs. Fortier, 27 A. 244; White vs. Bird, 20 A. 238; Gibson vs. Selby, 8 A. 319.

3. Vendor against whom judgment has already been obtained need not be made party in revocatory action.

Dumas vs. Lefebvre et al., 10 R. 399; 1 L. 503; 15 L. 470; Potier vs. Harman, 1 R. 525.

4. Defendant, maker of note, who severed, and judgment was rendered against him, and in favor of co-defendant, endorser, on appeal by plaintiff from latter judgment alone.

Gordon vs. Dreux et al., 6 R. 399.

5. Parties appellant, but subsequently acquiescing in judgment.

Vredenberg vs. Behan, 32 A. 562; Lane vs. Clarke, 27 A. 201.

6. Strangers to the record.

Patten et als. vs. Powell, 16 A. 128; Fish vs. Johnson, Levine et als., 16 A. 29.

7. Surety on injunction bond; when injunction dissolved without damages he is before court in person of his principal.

Matta vs. Gayle, 10 A. 347; Tilton vs. Vignes, 33 A. 240; Richardson vs. Chevally, 26 A. 551; Battalora vs. Erath, 25 A. 318; Lavedan vs. Trinchard, 35 A. 540; Lane vs. Rosellus, 23 A. 258; Mitchell vs. Lay, 4 A. 514.

8. Wife, when husband sues as head of community, or as administering his wife's estate.

Brannin vs. Womble, 32 A. 806.

9. Surety on attachment bond.

Patten, Lane, Merriam & Co. vs. Powell & Brothers, 16 A. 128; Campbell vs. Clark, 22 A. 242.

10. Garnishees against whom no judgment is asked.

Barner vs. Gordon, 16 A. 324.

11. Plaintiff in whose favor judgment was rendered by court without jurisdiction *ratione materis*.

Duncan vs. Holt, 21 A. 235.

(N) Want of proper parties to appeal not ground for dismissal if citation be asked.

Succession of Smith, 8 A. 57; Armstrong vs. Creditors, 8 A. 367; Burton vs. Sheriff, 9 A. 159; Williams vs. Courtney, 9 A. 98; Hickman vs. Bailey, 9 A. 485.

(O) Want of proper parties noticed ex officio by court at any time.

Tupery vs. Lafitte & Deffarge, 19 A. 296; Swearingen vs. McDaniel, 12 R. 208; Succession of Perry, 4 A. 577; Robert vs. Ride, 11 A. 410; Simmons vs. Creditors, 12 A. 755; 12 A. 774, 801; 26 A. 220; Succession of Forstall, 32 A. 97; Widow and Heirs of Baird vs. Russ, 33 A. 920.

(P) Mutuality of appealable interest.

Where one party has appealable interest, other party, *ipso facto*, is vested with same right.

State ex rel. Leche vs. Fowler, 41 A. 380; State ex rel. Nicholls vs. Mayor, 41 A.; Handy vs. New Orleans, 39 A. 107; Ready vs. New Orleans, 27 A. 169; State ex rel. — vs. Judge, 23 A. 595; State ex rel. Murtagh vs. Judge, 23 A. 761.

(Q) Amendment of judgment.

No amendment as between appellees; but co-defendant, as appellant, may pray for amendment.

Jaffray & Co. vs. Moss & Co., 41 A. 548.

565. Appeal From Final Judgments—One may appeal from all final judgments rendered in causes in which an appeal is given by law, whether such judgments have been rendered after hearing the parties, or by default.

C. P. 548.

(A) Appeal from final judgments:**1. Signing of judgment.**

Appeal from unsigned judgments in country considered as *taken nunc pro tunc*.

State vs. McKeown, 12 A. 596; State vs. Balize, 33 A. 542; Green vs. Kreg, 23 A. 705; Mouton vs. Broussard, 25 A. 497; E. R. Co. vs. Hamilton, 15 A. 521.

(a) But in the city judgment must be signed before appeal.

North vs. Leathers, 17 A. 97; Sibley, Gulon & Co. vs. Fernal Bros. & Co., 22 A. 188; Thiele & Lellier vs. Crutcher, 20 A. 539; Johnson vs. Ginnison, 20 A. 511; Labatt vs. Durruty, 20 A. 555; State vs. Bouchon, 20 A. 594; Bethancourt vs. Stephens, 9 A. 291; Leeds vs. La. Mfg. Co., 22 A. 16; Trost vs. Fox et al., 22 A. 410; Tietgens vs. Succession of Kamper, 23 A. 219; Succession of Millaudon, 23 A. 400; Frantz vs. Waggaman, 23 A. 26; Smith vs. E. R. Co., 34 A. 1160; 23 A. 7; 23 A. 904; 30 A. 63; 1 N. S. 89; 7 L. 513; 9 L. 276; 18 L. 80; 4 R. 451; 12 A. 756; 4 R. 47; 3 A. 62; 17 L. 65; Saloy vs. Collins, 30 A. 63; Jacob vs. Preston, 31 A. 514.

(b) And court will ex officio notice failure to sign.

Chartier vs. Police Jury, 9 A. 42.

- (c) Consent will not cure failure to sign.
Executors of Bird vs. Bird, 23 A. 262.
- (d) But where judgment really signed, though signature not copied in transcript, error corrected on *certiorari*.
Canal Co. vs. City, 44 A. 396.
- (e) Particularly will this be done in the cases affecting public corporations or institutions.
44 A. 396; 1 A. 215; 3 A. 230; 4 A. 180, 352; 7 A. 495.
- (f) No appeal from judgment declared null by court *a qua*, because signed and rendered in vacation.
Culver vs. Levoy, 21 A. 306; James & Co. vs. Fellows & Co., 28 A. 523; State ex rel. Dixon, Tutor, vs. Judge, 26 A. 119; Hernandez vs. James, 25 A. 483.

(B) *Appeal lies from final judgment:*

There is a final judgment where:

1. Judgment dismisses part of petition and part of prayer.
State ex rel. Ikerd vs. Judge, 35 A. 212.
2. Judgment decrees liquidation of community and refuses partition and passes on all issues.
State ex rel. Geddes vs. Judge, 36 A. 303.
3. Judge suspends clerk of court from office.
State ex rel. Durapan vs. Judge, 24 A. 610.
4. Garnishee having excepted to right of plaintiff to require answers to interrogatories and judgment overrules exception.
State ex rel. Tureaud vs. Judge, 23 A. 717.
5. When motion for new trial made on rendition of verdict by jury which was overruled and an appeal asked and allowed and bond filed—all prior to date of judgment; verdict is judgment of court, and appeal considered as taken *nunc pro tunc*.
Mouton vs. Broussard, 25 A. 497; Green vs. Hulette, 23 A. 704; R. R. Co. vs. Hamilton, 15 A. 521; McGregor vs. Barker, 12 A. 289; 12 A. 596.
6. Where judgment is of non-suit.
Davis vs. Young, 35 A. 740; Crocker vs. Turnstall, 6 R. 354; State ex rel. Ikerd vs. Judge, 35 A. 213; 2 M. 186; 7 M. 570; 3 N. S. 265; 16 L. 515.
7. Where judgment removes the case from a court, it is final as to that court; appeal lies from order of removal.
Kelly vs. Breedlove, 9 M. 492; Pooley vs. Morehouse, 13 A. 300; Powell vs. Kellar, 1 A. 25; 3 M. O. S. 185; Todd vs. Andrews, 3 N. S. 25; Rosenfield vs. Express Company, 21 A. 233; Jarreau vs. Choppin, 6 L. 130; 33 A. 490.

(a) Not so in New York.

41 N. Y. 149; 49 N. Y. 232.

(b) But no appeal lies from decree of removal from one State court to another, or court of concurrent jurisdiction.

State ex rel. Fontelleu vs. Judge, 81 A. 47; Todd vs. Andrews, 1 N. S. 25; Powell vs. Kellar, 1 A. 25; Pooley vs. Morehouse, 13 A. 300; Bajourin vs. Ramelli, 86 A. 1216; Hershheim vs. Levy, 83 A. 1283.

(c) And no appeal lies from order refusing removal; injury not irreparable.

Ralph vs. Claiborne, 2 M. 176; Higgins vs. McMicken, 6 N. S. 712; Baron vs. Kingsland, 5 L. 878; New Orleans vs. Shepherd, 9 A. 241; Chapman vs. Judge, 75 A. 326; Succession of Bodenheimer, 85 A. 1083; State ex rel. Coons vs. Judge, 23 A. 29.

8. Where judgment denies provisional syndic right to render his account to the definitive syndic through the court. He may appeal from order dismissing his petition and account.

Wood vs. Creditors, 85 A. 258; 2 M. 136; 7 M. 520; 3 N. S. 265; 16 L. 515; Succession of Hinkley, 30 A. 1083.

9. Where judgment homologates family meeting ratifying a compromise.

Succession of Forstall, 52 A. 97.

Or homologates act of partition.

State vs. Judge, 12 R. 315.

(C) Unappealable final judgments:

No appeal from judgments.

1. In contempt cases.

State ex rel. Farmer vs. Judge, 81 A. 116.

2. In submission to amicable compounders.

Hopkins vs. La. Western R. R. Co., 83 A. 1188; Davis vs. Leeds, 7 L. 476; In re Wallace, 81 A. 335; 7 A. 171; 4 A. 148; 12 A. 57.

But *aliter* where award goes beyond terms of the submission.

10 A. 643; 81 A. 335; Amet vs. Boyer, 86 A. 266; Dreyfous vs. Hart, 86 A. 929.

3. Nor from judgment which merely carries into execution a judgment which party has not appealed from.

State ex rel. Schmidt vs. Judge, 27 A. 703; Boutte vs. Executors of Boutte, 30 A. 179, 180.

4. Or which Supreme Court has rendered.

State ex rel. Ray vs. Judge, 30 A. 183.

(D) Executory process, appeal:

Appeal lies from decree for executory process.

Day vs. Fristoe, 7 M. 239; Tighlman vs. Diaz, 12 M. 691; Gurley vs. Croquet, 3 N. S. 498; McDonogh vs. Fort, 14 L. 350; Harrod vs. Voorhies, 16 L. 234; Bank vs. McKee, 2 A. 461; Mathe vs. McCrystal, 11 A. 4; Riley vs. Christie, 18 L. 256; Chambliss vs. Atchison, 2 A. 490.

(E) Prematurity of appeal—Appeal premature:

1. Before final judgment is signed, when case is one from New Orleans.

Smith vs. R. R. Co., 34 A. 1180; see *ante*, 44 A. 835.

Aliter in country parishes. See *ante*.

Mouton vs. Broussard, 25 A. 497.

2. Before condition precedent fixed to a valid judgment is accomplished, as where injunction is ordered to issue on furnishing bond hereafter to be fixed, no appeal lies until such bond is filed.

Jefferson & Lake Pontchartrain R. R. Co. vs. City, 30 A. 213.

566. Appealable Interlocutory Judgments—One may likewise appeal from all interlocutory judgments, when such judgment may cause him an irreparable injury.

C. P. 307.

(A) In what cases appeal lies where judgment is interlocutory.

In all cases where injury is irreparable, as in the following cases:

1. Order dissolving injunction on bond where acts complained of amount to trespass or change of possession of immovable property.

State ex rel. Sigur vs. Judge, 33 A. 133; Torres vs. Falgoust, 28 A. 560; Lake Pontchartrain Railroad Co. vs. New Orleans, 30 A. 970; 33 A. 340; Boedicker vs. East et al., 24 A. 154; Marion vs. Johnson, 22 A. 512; White vs. Casanave, 14 A. 57; Villavaso vs. Barthet, 38 A. 417; Delacroix vs. Villere, 11 A. 83; Bethancourt vs. Stephens, 19 A. 291; 16 L. 50; 5 A. 115; 15 L. 214; Brown vs. Brown, 30 A. 507; State ex rel. Bell vs. Judge, 35 A. 886; 15 L. 481; 2 R. 342; 12 A. 453; 6 L. 433; 12 L. 137; 12 L. 148; 7 R. 442.

2. But no appeal from order of dissolution where apprehended injury compensable in money and sufficient bond given.

Jure vs. City of New Orleans, 2 A. 321; *Stetson vs. City of New Orleans*, 12 R. 499; *Brott vs. Edgar, Ellerman & Co.*, 28 A. 262; *Cobb vs. Parham*, 4 A. 147; *Delacroix vs. Villere*, 11 A. 40; *Anderson vs. Smith*, 28 A. 649; *State ex rel. Cummings vs. Judge*, 29 A. 360; *Live Stock Landing Co. vs. City*, 32 A. 1192; *State ex rel. Sigur vs. Judge*, 33 A. 133; *Osgood vs. Black*, 33 A. 498; *State ex rel. Gravois vs. Judge*, 33 A. 760; *Live Stock Landing Co. vs. Butchers' Union*, 33 A. 990; *Levine vs. Michel*, 34 A. 1181; *Irwin vs. Telegraph Co.*, 36 A. 772; 38 A. 152.

3. Judgment on rule against purchaser under order of seizure and sale to show cause why proceeds should not be paid to plaintiff in rule.

State ex rel. Bagur vs. Judge, 24 A. 599.

4. Order perpetuating, or refusing to grant, an injunction, in clear cases, where injury irreparable.

Beebe vs. Guinault, 29 A. 795; *Fontelleu vs. Gates*, 33 A. 833; *State ex rel. Doullut vs. Judge*, 38 A. 869; *State ex rel. Behan vs. Judge*, 32 A. 1276; *Newell vs. Morton*, 3 R. 103.

5. Rescinding order of recusation.

Church Wardens vs. Perche, 36 A. 160; *Fields vs. Gagne*, 33 A. 339; *State ex rel. Fontelleu vs. Judge*, 31 A. 47; *Jarreau vs. Choppin*, 6 L. 133.

6. Order dismissing intervention.

Ikerd vs. Postlewalte, 36 A. 237; *Schlieder vs. Martinez*, 38 A. 983.

Or dismissing suit of plaintiff.

Hunstock vs. Hunstock, 43 A. 375.

7. Order dissolving injunction to restrain execution of judgment, and appeal may be suspensive.

State ex rel. Van Norden vs. Judge, 26 A. 550; *State ex rel. Winkleman vs. Judge*, 28 A. 902; *State ex rel. Becker vs. Judge*, 31 A. 850; *Beebe vs. Guinault*, 29 A. 995; 19 L. 172; *State ex rel. Stackhouse vs. Judge*, 21 A. 153; *State ex rel. Williamson vs. Judge*, 30 A. 315; *Tricou vs. Lewis*, 7 M. 459; *State ex rel. Behan vs. Judge*, 32 A. 1277.

8. Judgment appointing or refusing to appoint dative executor.

Succession of Townsend, 36 A. 536.

9. Judgment appointing receiver to partnerships at instance of judgment creditor of one partner.

Klotz vs. Macready, 35 A. 596; *Simonds vs. Judge*, 24 A. 424; *Martin vs. Blanchin et als.*, 16 A. 83; *State ex rel. Wood vs. Judge*, 27 A. 793.

10. Order dissolving attachment.

Ferguson vs. Chastant, 35 A. 339; *Wickman & Pendleton vs. Nalty*, 41 A. 234; *Watson vs. Simpson*, 15 A. 711; *Love, Savage & Co. vs. Mo-Comas*, 14 A. 201.

11. Order commanding delivery of slave in dispute to defendant on giving bond.

State ex rel. Judge, 12 A. 456.

Or commanding delivery of bank box.

State ex rel. Baumgarden vs. Judge, 35 A. 745.

12. Order directing bonding of attached property in favor of consignee.

Park vs. Porter, 2 R. 343.

13. Order rescinding former order to bond injunction.

Poydras vs. Tusson, 3 L. 443; *State ex rel. Doullut vs. Judge*, 29 A. 871; *State ex rel. Barthe vs. Judge*, 23 A. 903.

14. Order dismissing rule to dissolve injunction against ex-ecutory process, where rule puts at issue rightful issuance of *flat*.

Marero vs. Barker, 23 A. 302; *Riley vs. Lynd*, 8 M. 229.

15. Order in effect indefinitely suspending all proceedings in the suit.

Miller vs. Dupuy, 19 A. 166; *Bank vs. Blook*, 44 A. 394.

16. Order commanding defendant to close hole made in party wall pending suit.

Pierce vs. City, 16 A. 396.

17. Order dissolving injunction for insufficiency of surety, and mandamus issues to compel sending up of record.

State ex rel. Storrs vs. Judge, 11 A. 736; *State ex rel. Stackhouse vs. Judge*, 21 A. 153.

18. Order denying injunction by discharging rule *nisi*.

State ex rel. Van Norden vs. Judge, 26 A. 550.

19. Order granting injunction against city using canal and interfering with plaintiff's design to dam up said canal.

Jefferson and Lake Pontchartrain R. R. Co. vs. City, 30 A. 970.

20. Order rescinding former order which denied an injunction.

23 A. 903, 890, 889; *State ex rel. Doullut vs. Judge*, 29 A. 869.

21. Order dissolving injunction on bond, where act amounts to trespass and changes possession of immovable property.

Torres vs. Falgoust, 33 A. 560; *Villavaso vs. Barthe*, 33 A. 417; 22 A. 512; *Simon vs. Walker*, 26 A. 603; 24 A. 154; *State ex rel. Sigur vs. Judge*, 33 A. 133; 23 A. 151; 14 A. 57; 11 A. 39.

22. Order refusing to bond injunction.

Lattier vs. Abney, 43 A. 1018; *State ex rel. Barthe vs. Judge*, 26 A. 98.

Or sequestration.

State ex rel. Taylor vs. Judge, 26 A. 65.

23. Order granting removal to Circuit Court.

Fisk vs. Fisk, 4 N. S. 676; *Higgins vs. McMickin*, 6 N. S. 712; *Duncan vs. Hampton*, 12 M. 92; *Bank vs. Morgan*, 4 N. S. 344; *Fitz vs. Hayden*, 4 N. S. 653; *State ex rel. Ooons vs. Judge*, 23 A. 29; *Beebe vs. Armstrong*, 11 M. 440; *Rosenfield vs. Express Co.*, 21 A. 233; *Stoker vs. Leavenworth*, 7 L. 390; *Francisous vs. Surget*, 6 R. 83; *Tunstall vs. Madison*, 30 A. 474; *Goodrich vs. Hunton*, 29 A. 372.

24. Order discharging rule to show cause why opposition to homologation of report of experts should not be sustained and order for sale rescinded.

State ex rel. Caldwell vs. Judge, 26 A. 161.

25. Order perpetuating rule on administrator to pay claim out of personal estate.

State ex rel. Raspberry vs. Judge, 26 A. 385.

26. Order on rule against executor to stop sale.

State ex rel. Fassman vs. Judge, 22 A. 200.

27. Order on rule against executors directing execution for fixed sum.

State ex rel. DeFeriet vs. Judge, 24 A. 596.

28. Order of sale of corporate property by persons not authorized by law to sell.

State ex rel. Morey vs. Judge, 31 A. 324.

29. Order increasing amount of devolutive appeal bond.

Demarest vs. Belrne, 36 A. 751.

30. Order refusing filing of supplemental petition to engraft revocatory action on main suit.

Ins. Co. vs. Green, 33 A. 349.

31. Order denying preliminary injunction.

State ex rel. Tricou vs. Lewis, 7 M. 459; *State rel. Winkelman vs. Judge*, 28 A. 902; *Beebe vs. Guinault*, 29 A. 795; *State ex rel. Becker vs. Judge*, 31 A. 950.

32. Order dissolving on bond injunction by editor of newspaper against his associates' interfering with his full editorial control.

Puckette vs. Hicks, 39 A. 901.

33. Order dissolving on bond injunction aimed to prevent emptying of nuisance boats in the river.

Waterworks Co. vs. Ozer, 36 A. 913.

34. Order bonding sequestered property.
State ex rel. Street vs. Judge, 35 A. 515; State ex rel. Gay vs. Judge, 26 A. 299; State ex rel. Taylor vs. Judge, 26 A. 65.
35. Order maintaining *quo warranto*, though judgment be not final as to injunction asked.
State ex rel. Cain vs. Judge, 20 A. 574.
36. Order dismissing opposition to order of seizure and sale.
Heft vs. Kelly, 17 A. 143.
37. Order dismissing third opposition.
State ex rel. Bagur vs. Judge, 34 A. 599.
38. Order directing mandamus to issue to justice of the peace to examine accused parties.
State ex rel. Shelton, etc., 16 A. 159.
39. Order compelling defendant to produce books in court to be examined by experts.
State ex rel. Benton vs. Judge, 26 A. 57.
40. Order consolidating suits.
Elley vs. Creditors, 44 A. 370.
41. Decree of partition where co-ownership is involved.
Reynolds vs. Reynolds, 43 A. 1118; Ruthenberg vs. Helberg, 43 A. 410.
Aliter where ownership is admitted.
Stokes vs. Stokes, 6 N. S. 350.
42. Order of sale of succession property rendered on *ex parte* application of executor.
State ex rel. Moore vs. Judge, 31 A. 302; State ex rel. Upton vs. Judge, 37 A. 331; State vs. Fassman, 22 A. 200.
43. Order allowing \$250 per month alimony pending suit for divorce.
State ex rel. Holbrook vs. Judge, 24 A. 601.

(B) Interlocutory judgments not appealable, as not causing irreparable injury:

1. Granting new trial.
Wheeler vs. Mallot, 15 A. 659; McWillie vs. Perkins, 20 A. 163.
2. Granting continuance.
Smith vs. Henderson, 28 A. 575; 15 L. 521; Succession of Grace, 29 A. 694.
3. Transferring suit to another district court.
Todd vs. Andrews, 3 N. S. 25; Hershelm Bros. vs. Levy, 33 A. 1233; Powell vs. Kellar, 1 A. 25; Pool vs. Morehouse, 13 A. 300; State ex rel. Fontellen vs. Judge, 31 A. 47.

Aliter where right of transfer denied.

Jarreau vs. Choppin, 6 L. 180; Fontellieu vs. Judge 81 A. 47.

But see squarely *contra* :

Rosenfield vs. Adams Express Co., 21 A. 283; Olty vs. Shepard, 9 A. 241; 2 M. 176; 6 N. S. 712; 5 L. 878; 2 Woods, 120; State ex rel. Chapman vs. Judge, 15 A. 836.

4. Ordering administrator to file account.

Succession of Carriere, 34 A. 1056.

But *aliter* where he alleges he can file no other account.

Succession of Hinkley, 30 A. 1084.

5. Order imprisoning administrator for refusing to obey order to account.

Id.; State ex rel. Farmer vs. Judge, 31 A. 116.

6. All orders in matters of partition prior to final order homologating.

Cary vs. Richardson, 35 A. 505; Marionneau vs. Succession of Marionneau, 28 A. 892; Gay vs. Marionneau, 20 A. 358; Stewart vs. Pickard, 1 R. 415.

Aliter where order virtually stops all proceedings in the partition suit.

McCollum vs. Parker, 1 R. 513; State ex rel. Ventress vs. Judge, 30 A. 309.

7. Order submitting cause to referees.

Junek vs. Hezeau, 12 A. 249; Davis vs. Preval, 6 M. 422.

8. Ordering administrator to show cause why additional security should not be given by him.

Succession of Labauve, 33 A. 237.

9. Order overruling exception filed by executor to oppositions made by heirs to his account.

State ex rel. Ames vs. Judge, 32 A. 300.

10. Ordering executor to turn over to sheriff undivided portion of the heir in a succession not yet liquidated.

Deblieux vs. Hotard, 31 A. 194.

11. Order releasing on bond property seized either under *fi. fa.* or conservatory writs, where from nature of case injury is reparable.

State ex rel. Reth vs. Judge, 37 A. 846; Street's Case, 35 A. 515; Block Bros. vs. Barthet, 20 A. 344; State vs. Judge, 14 L. 591; 2 R. 395.

But see where appeal permitted and right enforced by *mandamus*.

State ex rel. Gay & Co. vs. Judge, 25 A. 299; also 20 A. 29, 22 A. 536.

12. Order directing seized notes to be returned to sheriff and restraining in meantime proceedings on seizure and sale.
Kennedy vs. New Orleans Savings Institution, 52 A. 1283.
13. Order dissolving injunction on bond, in contested election case.
State ex rel. Metaye vs. Judge, 36 A. 828; State ex rel. Pfing vs. Judge, 35 A. 785.
14. Order refusing to dissolve injunction on face of papers.
Woolfolk vs. Woolfolk, 22 A. 207; Cottam & Co. vs. Currie, 42 A. 875; Huntington vs. Sheriff, 7 A. 205; Succession of Labauve, 38 A. 856; Osborne vs. Clayton, 3 R. 487; 8 A. 487; 14 A. 888.
15. Order overruling exception of no cause.
Moore vs. Gordon, 14 A. 899.
16. Order granting injunction, unless, from special nature of case, injury would be irreparable.
Fontelleu vs. Gates, 36 A. 833; State ex rel. Doullert vs. Judge, 29 A. 869; Town of Donaldsonville vs. Police Jury of Ascension, 33 A. 248; 3 R. 487.
17. Order dissolving injunction on bond for amount of damages claimed.
Osgood vs. Black, 33 A. 498; Brott vs. Eager, Ellerman & Co., 28 A. 262; C. C. L. S. L. & Slaughter House Co. vs. Police Jury, 32 A. 1192.
 - (a) Or where release bond exceeds amount in dispute.
Anderson vs. Smith, 28 A. 649.
 - (b) But where facts show that injury would be irreparable, dissolving order on bond is appealable.
White & Trufant vs. Cazenave, 14 A. 57; Delacroix vs. Villere, 11 A. 89; State ex rel. Bene vs. Judge, 23 A. 151.
 - (c) As where act enjoined changes possession of immovable and amounts to trespass.
State ex rel. Ligen vs. Judge, 34 A. 133.
18. Orders overruling exceptions in progress of cause.
Blanks vs. Ins. Co., 36 A. 599; Bailey vs. Sims, 3 A. 217.
19. Order granting or refusing habeas corpus.
Ex parte Mitchell, 1 A. 413; Cook vs. Keeper of Prison, 15 A. 847; State ex rel. Agusti vs. Houston, 30 A. 1175.
20. Decree setting aside forfeiture of appearance bond.
State vs. Cole, 39 A. 938.
21. Order refusing to enjoin lessee from erecting electric battery and machinery on leased premises.
Winter vs. Fraenkel, 39 A. 1058.

22. Order refusing to issue an injunction on *ex parte* showing.

State ex rel. Newgass vs. Judge, 27 A. 672; see State vs. Lewis, 7 M. 457.

Aliter on rule *nisi*.

Heyniger vs. Huffnang, 29 A. 57; see State ex rel. Winkelman vs. Judge, 28 A. 902.

23. Order admitting reconstructed record to replace a mislaid or destroyed record.

State ex rel. Broussard vs. Judge, 39 A. 225.

24. Order of a judge recusing himself.

Fields vs. Gagne, 33 A. 333; Jarreau vs. Choppin, 6 L. 123; Board of Church Wardens vs. Perche, 86 A. 161.

25. Order striking out of answer defendant's demand in re-convention.

Harris vs. Stockett, 35 A. 387; State ex rel. Pfug vs. Judge, 35 A. 765.

26. Order permitting opponent of account filed by executrix to amend pleadings.

Succession of White, 2 A. 964.

27. Order sustaining plea of *res judicata*, when such plea is only one of many in the cause and when other issues remain to be passed upon.

Balley vs. Sims, 3 A. 218.

28. Preliminary order maintaining writ of provisional seizure.

Aurich vs. Wolf & Levi, 30 A. 375.

29. Order overruling motion to dissolve sequestration.

Wolff vs. McKinney, 21 A. 634; State vs. Judge, 2 R. 335; Wilson vs. Churchman, 4 A. 343.

30. Order dissolving sequestration on bond.

Wilson vs. Churchman, 4 A. 343; Hart vs. Phillips, 1 R. 223; Lemoine vs. Garcia, 4 A. 366.

Or dissolving injunction against performance of an act which can cause no irreparable injury.

State ex rel. Sterken vs. Judge, 37 A. 345; Schmidt vs. Foucher, 37 A. 174.

31. Order overruling motion to dismiss attachment.

Powell & Hopkins vs. Hopson, 12 A. 615; Mevritz vs. Marks, 22 A. 242.

32. Order permitting prayer for jury to be filed, continuing case, or sustaining challenge to array of jurors.

State ex rel. McCarthy vs. Manning, 21 A. 433.

33. Order refusing a continuance.

Gantret vs. Constant, 11 R. 486; Newman vs. Wildenstein, 42 A. 925.

34. Order bonding in favor of intervenor property provisionally seized.

Jennings vs. McConnico, 25 A. 651.

35. Order discharging rule for contempt.

Bayly & Pond vs. Well, 28 A. 264.

36. Order taking garnishee's interrogatories for confessed.

State ex rel. Scooler vs. Cooley, 23 A. 213.

37. Order refusing permission to file supplemental petition in ordinary cases.

Ins. Co. vs. Gerson, 38 A. 349; Penrice vs. Crothwaite, 11 M. 547; Glendani vs. Thomas, 13 L. 215.

38. Order accepting cession to creditors.

Hackett vs. Creditors, 43 A. 124.

(C) Interlocutory judgments need not be signed.

Interlocutory judgments, otherwise appealable, require no signature.

State vs. Judge, 12 A. 456; Van Winckle vs. Flechaux, 12 L. 150; Klotz vs. Macready, 35 A. 596.

(D) Tests of irreparable nature of injury:**1. When not adequately compensable in damages. But when injury would be compensable in damages, injury is not irreparable.**

Levine vs. Mitchell, 34 A. 1181; Cummings vs. Judge, 29 A. 860; Jure vs. City, 2 A. 521; Crescent City Live Stock Co. vs. Police Jury, 32 A. 1192; State ex rel. Sigur vs. Judge, 33 A. 133; Osgood vs. Black, 33 A. 493; C. C. L. Co. vs. Butchers' Union, 33 A. 930; C. O. L. Co. vs. Police Jury, 32 A. 1192; Stetson vs. City, 12 R. 489; Cobb vs. Farham, 4 A. 147; Delacroix vs. Villere, 11 A. 40; Anderson vs. Smith, 28 A. 649; State ex rel. Gravois vs. Judge, 33 A. 760.

2. When aggrieved party would be compelled to resort to another action to vindicate rights.

State vs. Judge, 12 A. 456; Hyde vs. Jenkins, 6 L. 435; Morey vs. Judge 31 A. 824; Gossett vs. Cashell, 14 A. 245; Taylor vs. Penrose, 12 L. 137; Oom-took vs. Pale, 15 L. 481; Jennings vs. McConnico, 25 A. 652; 2 R. 842; State ex rel. R. R. Co. vs. Judge, 23 A. 51.

3. When final action of court would be irreparable.

Katz & Barnett vs. Sorsby, 34 A. 583; Park vs. Porter, 2 R. 344; 9 M. 519; 6 L. 436.

4. When act if carried out would change possession of real property.

Marion vs. Johnson & Randall, 22 A. 512.

5. Where final judgment could not place aggrieved party in position he was before.

State ex rel. Cole vs. Judge, 29 A. 808; Hyde vs. Jenkins, 6 L. 427.

6. When thing complained of is a nuisance.

State ex rel. Doullut vs. Judge, 29 A. 878; Fuselier vs. Spaulding, 3 A. 773.

(E) Things not amounting to irreparable injury:

1. Delay, increased labor, expense, etc.

Cole vs. Judge, 29 A. 808; Woolfolk vs. Woolfolk, 22 A. 207.

(F) Appeal lies from certain orders not possessing qualities of judgments, e. g.:

1. Order of seizure and sale in executory process.

Mitchell vs. Logan, 34 A. 1003; Harvard vs. Voorhies, 16 L. 254; Riley vs. Christie, 18 A. 236; Rousseau vs. Bourgeois, 28 A. 136; Wise vs. Taylor, 32 A. 977; Mathe vs. McCrystal, 11 A. 4; 6 A. 446; 2 N. S. 32; Tilghman vs. Dias, 12 M. 695; Landry vs. Victor, 30 A. 1045; Day vs. Fristoe, 7 M. 239; Gurley vs. Croquet, 3 N. S. 498; McDonough vs. Fort, 14 L. 350; Bank vs. McKee, 2 A. 461.

2. Refusal to grant order of seizure and sale; and remedy solely by appeal, not mandamus.

State ex rel. Beebe vs. Judge, 28 A. 905; State ex rel. Padron vs. Judge, 31 A. 794; State ex rel. N. O. vs. Judge, 57 A. 549.

3. Order putting one in possession of an estate when there has been no judgment to that effect.

Denegre & Villere vs. Bayhi, 35 A. 255.

(G) Mandamus lies to compel granting of appeal in proper cases.

State ex rel. Loeb vs. Judge, 18 A. 628; State ex rel. Van Norden vs. Judge 26 A. 550; State ex rel. DeFerlet vs. Judge, 24 A. 596; State ex rel. Becker vs. Judge, 31 A. 850. See "Mandamus," C. P. 845 et seq.

567. No Appeal from Judgments Confessed or Acquiesced In, or After Legal Delay—The party against whom judgment has been rendered can not appeal:

1. Confession or Acquiescence—If such judgment have been confessed by him, or if he have acquiesced in the same, by executing it voluntarily;

2. Prescription—If he has suffered the time prescribed by law for appealing to elapse.

C. P. 575, 598, 612.

(A) No appeal where:

1. Judgment is confessed.

Stewart vs. Betzer, 20 A. 187; Skinner vs. Dameron, 5 R. 447; Parsons vs. Suarez, 9 L. 415; Landry vs. Connely, 4 R. 127; Second Municipality vs. Corning, 4 A. 407; Hewitt, Heran & Co. vs. Stewart, 11 A. 100; Succession of Carroll, 52 A. 141; Succession of Agana, 18 A. 59; Priestly & Blen vs. Shaughnessy, 10 A. 455.

2. Aliter where judgment does not conform to consent.

Sprowl vs. Stewart, 19 A. 438.

3. Where judgment acquiesced in by execution effected by subsequently appealing party.

State vs. Judge, 4 A. 85.

4. There is no consent judgment:

Where court renders judgment *ex proprio motu*.

Heirs of Burney vs. Ludelling, 41 A. 627.

5. Judgment may be taken for part of debt admitted; and appeal lies from judgment for balance if sufficient in amount.

Second Municipality vs. Corning, 4 A. 407; Parsons vs. Suarez, 9 L. 418; Small vs. Zacharie, 4 R. 145; Skinner vs. Dameron, 5 R. 447.

(B) No appeal lies where there is acquiescence:

See Evens & Taylor vs. Succession, 29 A. 576; 5 A. 233; 28 A. 88; 42 A. 69; 28 A. 274; 28 A. 744; 27 A. 230; 27 A. 625.

1. There is no acquiescence and voluntary execution:

(a) Where payment is compulsory.

Duncan vs. Wise, 39 A. 74; Johnson vs. Clark & Meader, 29 A. 763; Priestly & O'Bein vs. Shaughnessy, 10 A. 455; Yale vs. Howard, 24 A. 458; Leggett vs. Peet, 1 L. 296; Verges vs. Gonzales, 38 A. 412.

Or part payment made after appeal.

Harris vs. Stubenrauch, 18 A. 724.

(b) Where party merely fails to move for new trial.

Jackson vs. Murdock, 33 A. 727.

(c) Where party fails to apply for mandamus to grant appeal from judgment dismissing part of petition and prayer.

Ikerd vs. Judge, 35 A. 213.

Or where appeal from only portion of judgment is abandoned.

Dwight vs. Brashear, 12 A. 860.

- (d) Where party appoints appraisers, attends and bids at sale and performs only conservatory acts.

Factors and Traders' Ins. Co. vs. New Harbor Protection Co., 37 A. 234; *Prentice vs. Chewing*, 1 R. 70; *Jackson vs. Michel*, 33 A. 723; *Alter vs. Pickett*, 24 A. 573; *Yale vs. Howard*, 24 A. 458; *State ex rel. Hoey vs. Brown*, 29 A. 862; *Johnson vs. Clark*, 29 A. 762.

- (e) When document offered to show acquiescence reserves right of devolutive appeal.

Michel vs. Sheriff, 23 A. 58.

- (f) Where payment is made subject to the decision of the court.

Guevenet vs. Perret, 18 A. 863.

- (g) Where appellant, without consideration, promised to pay judgment if seized property were released for thirty days.

State ex rel. Lacroix vs. Judge, 25 A. 665.

- (h) Where finance clerk paid judgment against city.

Serrill vs. City, 27 A. 520.

- (i) Where party asserts denied right in another capacity in a new suit.

Third Ward School District vs. City School Board, 23 A. 152; *Meyer vs. Schurbruck*, 37 A. 873; *Buntin vs. Johnson*, 27 A. 623.

- (j) Where party, defeated on application for appointment as administrator, joins issue in suit brought by administrator.

Succession of Lamm, 40 A. 812.

- (k) Where party executes judgment under protest and with reservation of right of appeal.

Colvin vs. Woodward, 40 A. 627; *State ex rel. Hoey vs. Brown*, 29 A. 862.

- (l) Where party, whose attachment was dissolved, does not then appeal but still prosecutes the suit to judgment.

Wickman & Pendleton vs. Nalty, 41 A. 234.

2. There is acquiescence:

- (a) Where appeals granted are abandoned.

Jenkins vs. Bond, 3 A. 839; 4 L. 41; 1 R. 100; *Collins vs. Monticou*, 9 A. 59; *Ware vs. Morris*, 42 A. 760; *Williams vs. LeBlanc*, 15 A. 591.

- (b) Where judgment is partially or fully executed.

David vs. Parish of East Baton Rouge, 27 A. 230; *Sims vs. Lawes*, 22 A. 105; *White vs. Ramsey*, 14 A. 828; *Peniston vs. Somers*, 15 A. 679; *Succession of DeEgana*, 18 A. 59; 4 A. 143.

(c) When appellant does acts which import full compliance with decree.

Board of Church Wardens vs. Bishop, 40 A. 201; Stinson vs. O'Neal, 32 A. 947; Powell vs. Hensheim, 37 A. 681.

(d) Where appellant from order removing case to Federal court files record in that court and moves for dissolution of injunction.

R. R. Co. vs. R. R. Co., 33 A. 1273.

3. Acquiescence of one party does not affect rights of others.
State ex rel. Duffel vs. Marks, 30 A. 70; Vredenburg vs. Behan, 32 A. 564.

4. Acquiescence must be clearly shown; it is never presumed.

Colvin vs. Woodward, 40 A. 627, and cases cited; Wickman & Pendleton vs. Nalty, 41 A. 284.

(C) *Case remanded to try question of fact of acquiescence:*

1. When issue of acquiescence or execution, *vel non*, is raised in Supreme Court, case will be remanded to hear evidence.

Ware vs. Morris, 41 A. 647; Evans & Taylor vs. Succession of Etheridge, 29 A. 576; Vredenburg vs. Behan, 32 A. 475; State ex rel. Blackman vs. Judge, 32 A. 173; Board of Wardens vs. Perche, Bishop, 39 A. 233; Succession of Carroll, 32 A. 141; R. R. Co. vs. R. R. Co., 33 A. 1273; Buntin vs. Johnson, 27 A. 625; State ex rel. Fairax vs. Judge, 33 A. 929; James vs. Fellowes, 28 A. 87.

2. Supreme Court absolutely incompetent even by consent to hear original evidence on appeal.

R. R. Co. vs. R. R. Co., 33 A. 1273; Campbell vs. Orillion, 3 A. 115; Tanneret vs. Ina Co., 32 A. 665; but see State ex rel. St. Martin vs. Judge, 28 A. 272.

568. Appeal to District from Parish Courts—An appeal lies to the district courts from all judgments rendered by parish courts in all cases when the amount in contestation exceeds one hundred dollars exclusive of interest.

(*Inoperative.*)

569. Appeal from Parish Courts—Such appeals must be carried before the district court, within whose jurisdiction the parish, where the judgment was rendered, is included; or before the Supreme Court, when the matters are probate and the amount in dispute shall exceed five hundred dollars exclusive of interest.

(*Inoperative.*)

570. Appeal to Supreme Court—An appeal lies from all judgments rendered by the district courts of the State when the matter in dispute shall exceed five hundred dollars; and from the district and parish courts, alike, when the constitutionality or legality of any tax, toll, or impost of any kind or nature whatsoever, or any fine, forfeiture, or penalty, imposed by a municipal corporation, shall be in contestation, whatever may be the amount thereof.

Such appeals must be carried before the Supreme Court of the State.

39 A. 319; 41 A. 526; C. P. 874, 875.

Superseded by Art. 81 of Constitution of 1879.

See C. P. 874 *et seq.* for complete analysis of appellate jurisdiction of Supreme Court.

571. Who May Appeal—Third Persons—The right of appeal is given, not only to those who were parties to the cause in which a judgment has been rendered against them, but also to third persons not parties to such suit, when such third persons allege that they have been aggrieved by the judgment.

(A) *Who may appeal. Appealable interest:*

1. Executor may appeal from judgment recognizing heirs and ordering them to be put in possession.

Succession of Charnbury, 84 A. 25; Succession of McKenna, 23 A. 369; Succession of Baumgarten, 35 A. 127.

2. Executor may appeal officially as executor from judgment against him and in favor of succession.

Succession of Ames, 39 A. 1320; Succession of Baumgarten, 35 A. 127.

3. But administrator must always appeal in his individual capacity in such cases.

Succession of Mansberg, 37 A. 126; J. U. & H. M. Payne & Co. vs. Dejean, 52 A. 389; State ex rel. Rasberry vs. Judge, 26 A. 383; 11 A. 177; 12 A. 774; 19 L. 278; 5 R. 140.

4. Administrator must concur in appeal by one of the heirs from judgment against succession.

Beall vs. Succession of Elder, 34 A. 1099; West vs. Davis, 34 A. 333; Audot vs. Gilly, 12 R. 325; Prejean vs. Robin, 14 A. 783.

5. Widow and heirs may intervene and appeal from judgment affecting title or possession of real estate belonging to succession, even when executors have appealed.

Boutte vs. Executors of Boutte, 80 A. 177.

6. Governor may appeal for State; so also may Attorney General, even when District Attorney refuses to appeal.

State ex rel. *Miller vs. Reid*, 45 A. 162; State ex rel. *Straus vs. Dubuclet*, 25 A. 168.

And State Tax Collector in tax suits.

Smith vs. City, 43 A. 726.

7. Creditor may appeal from judgment against debtor.

Payne vs. Ferguson, 28 A. 582; *Heirs of Woolfolk vs. Woolfolk*, 20 A. 518.

8. Garnishee may appeal from judgment condemning him.

Halpin vs. Barringer, 26 A. 170; State ex rel. *Tureaud vs. Judge*, 28 A. 718; 13 L. 570; 14 L. 511; 18 L. 406.

Aliter when not condemned to pay.

Rochereau vs. Guldry, 24 A. 294.

9. City may appeal from judgment against Treasurer.

State ex rel. *Mount and City of New Orleans vs. Judge*, 22 A. 119.

10. Curator *ad hoc* may appeal on behalf of one whom he represents.

Langley & Kinkad vs. Burrows, 15 A. 892.

(B) Who may not appeal and when:

1. Syndic in contest between creditors, where he has no interest.

Ferguson vs. Creditors, 19 L. 278; *Kohn, Syndic, vs. Wagner*, 1 R. 275; *Pandelly vs. Creditors*, 1 A. 22; *Beer & Co. vs. Creditors*, 12 A. 774.

2. Clerk of court ordered to sheriff all processes of his court requiring service.

State ex rel. *Burton vs. Jackson*, 28 A. 80.

3. Mortgage creditor from executory process of subsequent mortgage creditor.

Sompayane vs. Succession of Hyams, 28 A. 273.

(C) Appeal by third person:

1. Even person not party to record may appeal by alleging pecuniary grievance and establishing same by affidavit in lower court or on appeal.

Mutual Ins. Co. vs. Costa, 82 A. 8; *Bonnet vs. Judge ad hoc*, 25 A. 597; *Succession of Henderson*, 2 R. 891; 44 A. 570; *Byerly vs. Judge*, 28 A. 768; State ex rel. *Belden vs. Markey et al.* 21 A. 748; *Fazende vs. Flood*, 24 A. 426; State ex rel. *Pecot vs. Judge*, 27 A. 184; 28 A. 524; 27 A. 819; 17 A. 520; 84 A. 216; 8 R. 113; *Keys, Malby & Co. vs. Riley*, 12 A. 19; *Malone vs. Husband*, 10 A. 84; 6 R. 156; *Pillot vs. Barlisle*, 7 A. 656; 2 R. 692; 81 A. 823; 24 A. 486; 22 A. 176; 21 A. 52; 24 A. 16; 30 A. 801; 43 A. 1071; 88 A. 196; 23 A. 582; 25 A. 627.

2. Third person intervening creditor can not appeal after defendant has failed to prosecute appeal within legal delay.

Landry vs. Landry, 21 A. 142.

3. Third person appealing must cite plaintiff and defendant.

Escoubas et al. vs. Calcasieu Sulphur Mining Co., 33 A. 484; State vs. Wickliffe, 21 A. 755.

4. Appeal denied to third person when his claim requires proof, or when new evidence will be required to show that judgment appealed from is erroneous.

State vs. Judge, 18 A. 199.

(D) Authorization of wife to appeal: Authorization sufficiently appears:

1. By joining of husband in petition or motion of appeal.

Boutte vs. Executors of Boutte, 80 A. 180; but see Succession of Pome-roy, 21 A. 576; Lacour vs. Delamarre, 2 A. 140; Bray vs. Bynum, 2 A. 579.

2. By authorization to prosecute or defend suit in lower court.

Bell vs. Silbernagel, 23 A. 569.

572. Appeal by Tutors, Curators, etc.—Tutors, curators, and other persons charged with the administration of another's estate, may appeal for the benefit of the persons whose property they administer, if they deem an appeal necessary.

See C. P. 598, 575.

573. Appeal by Petition or Motion—Whoever intends to appeal, may do so either by petition, or by motion in open court at the same term at which the judgment was rendered, upon offering to give such surety as the court may direct, as hereafter provided.

C. P. 598; R. S. 29, 566.

(A) Modes of appealing:

1. By motion—citation—when:

(a) No citation necessary when motion made at same term at which judgment rendered, though citation prayed for and ordered.

Bank vs. Legendre, 35 A. 792; Boyd vs. Labranche, 35 A. 205; State ex rel. Blackman vs. Strong, 32 A. 173; Jacob vs. Preston, 31 A. 514; Sauer vs. Oil Co., 43 A. 699; Blessey et al. vs. Kearay, 24 A. 209; Fisk vs. Moss, 21 A. 529.

- (b) Citation is necessary when petition filed at subsequent term, or after adjournment, and where not prayed for appeal is dismissed.

Walker vs. Martolo, 16 L. 50; Bolling vs. Anderson, 10 A. 660; Pratt vs. Erwin, 5 A. 115; St. Rome vs. Sterling, 21 A. 279; Potler vs. Thibodaux, 21 A. 618; Hardy vs. Stevenson, 27 A. 96; Fournet vs. Van Wickle, 33 A. 1108; Wheeler & Pierson vs. Peterkin, 38 A. 663; Trounstone & Co. vs. Ware & Munn, 39 A. 939; 42 A. 716.

- (c) Motion presumed to have been taken in open court.
Washburn vs. Frank, 31 A. 427; Gaidry vs. Lyons, 29 A. 4.

2. Who may appeal by motion:

Even third persons may so appeal.

State ex rel. City vs. Judge, 21 A. 733.

3. Appeal by motion in vacation:

Appeal by motion in vacation in cases of mandamus, etc.

See 21 A. 733.

4. From what judgments:

Appeal from decree rendered in chambers, by motion in open court, in presence of counsel, is valid.

Brown vs. Brown, 30 A. 509.

5. Citation essential—when:

Before justices of the peace, citation of appeal is essential unless appeal taken in presence of other party.

Mayor vs. Gaillard, 17 A. 120; Delery vs. Tavinet, 15 L. 214.

(B) *By petition:*

1. Appellee must be cited.

Escoubas vs. Mining Co., 33 A. 494; State vs. Wickliffe, 21 A. 733.

2. Appeal must be by citation and petition when taken at different term from that at which judgment was rendered.

Hardy vs. Stevenson, 27 A. 96.

3. Parties appellee need not be mentioned by name in petition of appeal when proceedings are referred to and judgment shows on its face who were parties.

Vredenburg vs. Behan, 32 A. 561; Succession of Townsend, 36 A. 448.

4. It is sufficient to ask that appellee, or parties in interest, be cited.

Murphy vs. Factors and Traders' Ins. Co., 33 A. 455; Walker vs. Simon, Jr., 21 A. 669; Nelson vs. Beard et al., 16 A. 303; Jones vs. Caperton, 14 A. 799; Lewis vs. Hennen, 13 A. 259; Barton vs. Cavanaugh, 12 A. 832; Broussard vs. Broussard, 2 A. 769; Comstock vs. Smith, 17 L. 515; Ulman & Co. vs. Briggs, Payne & Co., 32 A. 655; Borde vs. Erskine, 29 A. 822; Hearing vs. M. C. Ins. Co., 29 A. 832; Wood vs. Creditors, 35 A. 258; 20 A. 37; Sears vs. Wilson, 4 A. 525; Ludeling vs. Frellsen, 4 A. 534; Whittemore vs. Watts, 7 R. 10; 6 M. 1.

5. It need not contain specific prayer for citation.

Wood & Roane vs. Wood, 81 A. 891; *Ludelling vs. Frellesen*, 4 A. 484; *Barton vs. Cavanaugh*, 12 A. 832; *Broussard vs. Broussard*, 2 A. 769.

But if no citation is asked and none issued, appeal will be dismissed.

See *Succession of Townsend*, 36 A. 447; *Fournet vs. Van Wickle*, 33 A. 1109, and cases cited.

(C) Appeals in divorce cases:

Appeal is suspensive and must be taken in thirty days; no devolutive appeal allowed thereafter.

Acts 1871, p. 151; *Holbrook vs. Bronson*, 25 A. 51.

(D) Appeal by petition: Citation:

When appeal is by petition, citation essential unless waived; and so also when appeal is by motion at subsequent term or in chambers.

State ex rel. Blackman vs. Strong, 32 A. 173; *Wheeler & Pierson vs. Peterkin*, 38 A. 663; *Walker vs. Martolo*, 16 L. 50; *Bolling vs. Anderson*, 10 A. 650; *Pratt vs. Erwin*, 5 A. 115; *St. Romes vs. Sterling*, 21 A. 277; *Potier vs. Thibodaux*, 21 A. 618; *Hardy vs. Stevenson*, 27 A. 35; *Fournet vs. Van Wickle*, 33 A. 1108; *Bank vs. Legendre*, 35 A. 787; *Boyd vs. Labranche*, 35 A. 236; *Schmidt vs. Drouet & Rabasse*, 42 A. 716.

(E) Citation in proper capacity:

1. Appellee need not be cited as "liquidator," record otherwise showing that he is liquidator.

Klotz vs. Macready, 35 A. 596.

574. Order of Appeal—Bond and Return Day—The judge, in granting the appeal so demanded, shall state, at the foot of the petition of appeal, the amount of the surety to be given by the appellant, and the day on which the appeal shall be returned; and when the appeal has been granted upon motion in open court, the judge shall fix the amount of security, and cause the same, with the order granting the appeal, to be entered upon the minutes of the court; and, in such case, no citation of appeal, or other notice to appellee, shall be necessary.

C. P. 573; *R. S. 29, 566*; *R. S. 80, 87, 40, 41, 43, 60, 567, 570, 1921, 2157, 3788*.

(A) Order of appeal:**1. Essential.**

Reed vs. Creditors, 37 A. 307; Sthele vs. Millsbaugh, 33 A. 135; Weiser vs. Blase, 34 A. 833; Ikard vs. Postlewaite, 34 A. 1236; Phillips vs. Creditors, 35 A. 935; Morris vs. Warren, 22 A. 458; 20 A. 196; 22 A. 858, 458; 21 A. 649; 22 A. 878; 23 A. 543; 24 A. 276; 27 A. 97; 34 A. 833; Cane vs. Pollock, 5 A. 636; Spencer vs. McDonogh, 11 A. 420.

2. But failure of judge to sign order for suspensive appeal within ten days is not ground for dismissal where appellant filed petition and bond in ample time.

Austin vs. Scovill, 34 A. 486; Succession of Parker, 18 A. 645; Dunn vs. Chaffe, 10 A. 493.

(a) Entry on minutes that motion for appeal was filed not sufficient.

Phillips vs. Creditors, 35 A. 935; Norris vs. Warren, 22 A. 458; Moore vs. Simms, 21 A. 649.

(b) But entry on minutes that appeal was granted is sufficient.

Theriot vs. Michel, 23 A. 107.

(c) And this entry may be made *nunc pro tunc*.

Dykes vs. Cockrell, 6 A. 707.

(d) Want of order of appeal not supplied by consent.

Gibson vs. Selby, 2 A. 628; Batchelor vs. Creditors, 20 A. 126; Dupre vs. Mouton, 23 A. 543.

(e) Nor by judge's affidavit.

Moore vs. Simms, 21 A. 649.

(B) Character of appeal:**1. Bond determines primarily quality of appeal as suspensive or devolutive. Thus where bond insufficient for suspensive appeal, while prayer and order are for suspensive appeal only, appeal maintained as devolutive.**

Succession of Payne, 25 A. 202; Poydras vs. Patin, 5 L. 129; Tipton vs. Crow, 3 R. 63; Hewes vs. Baxter 45. A. 1060; Glover vs. Taylor, 33 A. 634; Brode vs. Ins. Co., 3 R. 42; Jones vs. Frelson, 9 R. 135; Chaffe vs. Carroll, 34 A. 122; Ralph vs. Hoggutt, 2 A. 462; Bowie vs. Davis, 33 A. 347; Lewis vs. Splane, 2 A. 754; Morlee vs. Edwards, 20 A. 236; Ludeling vs. Frelson, 4 A. 534; Succession of Armat, 20 A. 340; Gibson vs. Selby, 2 A. 630; Edgerly vs. Smith, 27 A. 97; 15 A. 592; Succession of Keller, 39 A. 531; Bank vs. Fortier, 27 A. 244; overruling Reed vs. Creditors, 37 A. 907, holding that character of appeal determined by order, and appeal under above circumstances would not be devolutive unless order was in alternative, citing Poole vs. Chaffe & Sons, 36 A. 539; Phillips vs. Creditors, 35 A. 935; Weiser vs. Blase, 34 A. 833; Bank vs. Barrow, 24 A. 276; Dupre vs. Mouton, 23 A. 543.

2. Order may be in alternative, for suspensive or devolutive appeal.

29 A. 839; *Funke vs McVay*, 21 A. 192.

3. Or merely for an appeal, character of which to be determined by bond.

State ex rel. Eustis vs. Judge, 27 A. 685.

4. Application for suspensive includes application for devolutive appeal.

Succession of Payne, 25 A. 202.

5. Where bond given for appeal without order, or order given in appeal without bond, appeal lost.

Bank vs. Barrow, 24 A. 276.

6. Order of appeal must appear of record; not supplied by affidavit that one was granted, and when clerk omits to enter on minutes, it may be entered *nunc pro tunc*.

Moore vs. Simms, 21 A. 647; *Edgerly vs. Smith*, 27 A. 97; *Dykes vs. Cockrell*, 6 A. 707.

(C) *Order of appeal rescinded:*

1. When improvidently given.

State ex rel. Clientat vs. Judge, 52 A. 816; *Sthele vs. Millsbaugh*, 33 A. 194; *Mrs. Jackson vs. Michie & Murdock*, 52 A. 723; *Bates vs. Weathersby*, 2 A. 484; 10 A. 488.

2. But order must be rescinded at some time before perfection of appeal divests lower court of jurisdiction.

State ex rel. Gill vs. Tissot, 34 A. 91; State ex rel. Johnson vs. Judge, 21 A. 114; *Perilliat vs. Fernandez*, 16 A. 191; *Fournet vs. Van Wickie*, 34 A. 1109; State ex rel. E. R. Co. vs. Judge, 39 A. 774; State ex rel. Roman vs. Judge, 22 A. 591; State ex rel. Irwin vs. Judge, 36 A. 192; State ex rel. E. R. Co. vs. Judge, 27 A. 700.

3. Amendment of order of appeal:

No correction of minutes in chambers made without notice to opposing parties.

Picard & Well vs. Prival, 35 A. 371; *State vs. Folke*, 2 A. 744; *State vs. Revells*, 31 A. 367.

(D) *What judge may grant order of appeal:*

1. Judge *ad hoc*.

Succession of Edwards, 34 A. 219; *Nugent vs. Stark*, 34 A. 630.

2. Judge of concurrent jurisdiction in absence of judge rendering judgment.

Austin vs. Scovill, 34 A. 486; *Widow St. Romes vs. Cotton Press Co.*, 31 A. 224.

3. Unrecused judge though party to record.

Gibson vs. Selby, 2 A. 628.

Unambiguous terms of order control subsequent statements of judge.

State ex rel. R. R. Co. vs. Judge, 89 A. 774; *Bourg vs. Gerding*, 83 A. 1369; *State ex rel. R. R. Co. vs. Judge*, 84 A. 1118.

4. Orders in alternative:

Order may allow either devolutive or suspensive appeal.

Trounstone & Co. vs. Ware, 89 A. 941; *Jenkins vs. Howard*, 21 A. 597.

(E) Bond.

1. Judge fixes amount of bond, when not fixed by law, and states return day of appeal.

Succession of Hardesty, 29 A. 289; *State vs. Judge*, 16 A. 871; 20 A. 106; 21 A. 43; *State ex rel. Jorda vs. Judge*, 29 A. 776; *Keenan vs. Whitehead*, 15 A. 833.

2. But bond for suspensive appeal from judgment for specific sum is regulated by law.

Rachal vs. Rachal, 11 A. 696; *State ex rel. Adams vs. Judge*, 21 A. 64; *Surget vs. Stanton*, 10 A. 818; *Duperon vs. Van Wickie*, 1 R. 824.

3. Bond insufficient for suspensive may sustain appeal as devolutive.

Keenan vs. Whitehead, 15 A. 833; 2 A. 462; 4 A. 584; 5 A. 860; 12 A. 175; 10 A. 110; 5 R. 63; 9 R. 167; 6 A. 562; 2 L. 87; 5 L. 129.

(F) Return day of appeal:

1. Must be fixed by judge.

(a) When fixed by judge, without suggestion of appellant, appeal not dismissed if return day erroneous.

Elder vs. City, 31 A. 500; *Dellwood's Case*, 33 A. 1229.

(b) When suggested by counsel, appeal dismissed if return day erroneous.

State ex rel. Leche vs. Fowler, 42 A. 151; 40 A. 618; 38 A. 542; 35 A. 960; 32 A. 692; 27 A. 540; 86 A. 865.

2. Extension of return day.

Lower court has no power to extend.

Lacroix vs. Camors, 34 A. 645.

3. Return day in intrusion into office cases.

Appeals in cases under intrusion into office act are returnable in ten days.

Act 45 of 1870, § 7; *State ex rel. Attorney General vs. Wharton*, 25 A. 7; *State ex rel. Leche vs. Fowler*, 42 A. 143; *State ex rel. Slack vs. Hall*, 26 A. 58.

575. Suspensive Appeal—Delay Bond—Surety—If the appeal has been taken within ten days, not including Sundays, after the judgment has been notified to the party cast in the suit, when such notice is required by law to be given, it shall stay execution and all further proceedings, until definitive judgment be rendered on the appeal; provided, the appellant gives his obligation, with good and solvent security, residing within the jurisdiction of the court, in favor of the clerk of the court rendering the judgment, for a sum exceeding by one-half the amount for which the judgment was given, if the same be for a specific sum, as security for the payment of the amount of such judgment, in case the same is affirmed by the court to which the appeal is taken. Appeal bonds, in all cases of appeal, shall be made payable to the clerk of the court which rendered the judgment appealed from, and any appellee interested in the appeal shall have recourse on such appeal bonds against the appellant and the securities on the appeal bond, for any liability that may accrue in favor of the appellee on account of such appeal.

Whenever an answer has been filed in a suit in which the defendant has had personal service made upon him to appear and file his answer, or when a judgment has been rendered in a case after answer filed by the defendant, or by his counsel, the party cast in the suit shall be considered duly notified of the judgment, by the fact of its being signed by the judge; provided, that in the country parishes no execution shall issue in cases where an appeal lies, until ten days after the adjournment of the court, by which the judgment was rendered, within which delay a party may take a suspensive appeal on filing petition and appeal bond, as now provided by law.

In the Second Judicial District Court for the parish of Jefferson, no execution shall issue in cases where an appeal lies, until ten days, not including Sundays, after the

judgment has been notified to the party cast in the suit, or until ten days, not including Sundays, after the signing of the judgment, where no other notice is necessary, within which delay a party may take a suspensive appeal, on filing petition and appeal bond, as provided by law.

Q. P. 264, 578, 593, 596, 624; amended by Act 24 of 1876, p. 49.

(A) Suspensive appeal.

1. Time within which it must be taken:

Must be taken within ten days, excluding Sundays.

Boyd vs. Labranche, 85 A. 286; Reed vs. Creditors, 37 A. 907; Irby, McDaniel & Co. vs. Fore & Co., 28 A. 188; Dwight vs. Barrow, 25 A. 424; State ex rel. Rayssignier vs. Judge, 37 A. 118; Decourman vs. Levistones, 4 A. 80; Wood vs. Calloway, 21 A. 481; State ex rel. Hargrove vs. Judge, 37 A. 372.

Moreover, days of appealing and signing of judgment are not counted.

Garland vs. Holmes, 12 R. 241; State ex rel. Mercier vs. Judge, 20 A. 228.

2. Ten days delay runs:

(a) From rendition of judgment.

Webb vs. Keller, 85 A. 980.

(b) From adjournment of court in country.

Boyd vs. Labranche, 85 A. 286.

(c) From notice of judgment when notice necessary, and notice not necessary when citation was personally served or defendant filed answer.

Verges vs. Gonzales, 33 A. 410; State ex rel. Lobdell vs. Judge, 22 A. 90; Taylor vs. Woodward, 25 A. 218; Webb vs. Keller, 85 A. 980; Sentmanat vs. Soule, 33 A. 609.

3. Prior to Act 24 of 1876, notice required in all cases of judgment by default, whether service was personal or not.

For vs. Woodward, 25 A. 212; State ex rel. Zimmerman vs. Judge, 34 A. 655; Board of Administrators, etc., 34 A. 98.

4. To whom notice of judgment must be given:

(a) To parties only; executors need not be notified of *ex parte* order putting heirs in possession.

State ex rel. Zimmerman vs. Judge, 34 A. 653.

(b) To surety on injunction bond.

Verges vs. Gonzales, 33 A. 410.

5. *At what time appeal considered taken:*

From filing of petition and bond; order may be granted after ten days.

State ex rel. Allen & Syme vs. Judge, 35 A. 1109.

6. *Extension of time to appeal:*

Not permitted even by consent.

Utereiner vs. Miller, 29 A. 435; Lacroix vs. Camors et als., 34 A. 645; but see *contra* State ex rel. R. R. Co. vs. Judge, 27 A. 697.

7. *Suspensive appeal from judgment dissolving provisional injunction against execution of judgment stays execution.*

State ex rel. Behan vs. Judge, 32 A. 1277; State ex rel. Williamson vs. Judge, 30 A. 315; State ex rel. Stackhouse vs. Judge, 21 A. 153; State ex rel. Becker vs. Judge, 31 A. 850; Beebe vs. Guinault, 29 A. 795; State ex rel. Kennedy vs. Judge, 32 A. 1233.

But where the provisional injunction was never granted, a suspensive appeal from judgment on rule denying such injunction will not suspend execution of original judgment.

State ex rel. Zimmerman vs. Judge, 34 A. 652.

(B) *Appeal bond:*

1. *Necessity. Bond is essential.*

Braud vs. West, 14 A. 133.

2. *Amount, when appeal is suspensive:*

(a) *In money judgments, bond should be for amount exceeding by one-half the amount of judgment.*

State ex rel. Jorda vs. Judge, 29 A. 776; Marchand vs. Casanave, 22 A. 626; Succession of Armat, 20 A. 340; Tournillon vs. Ratcliff, 20 A. 179; State ex rel. Wassel vs. Judge, 22 A. 115; 5 A. 390; 12 A. 175.

(b) *Interest accrued at time of bond included.*

Marchand vs. Casanave, 22 A. 626.

(c) *Previous to 1868, bond need only exceed one-half of judgment.*

Denton vs. Reading, 22 A. 607; Yale & Bowling vs. Cole, 31 A. 690.

3. *In executory process, suspensive appeal bond must be for one-half over and above amount of order.*

State ex rel. Bankhead vs. Judge, 22 A. 35; Tournillon vs. Ratcliff, 20 A. 179.

(a) *Even on appeal from injunction issued without bond under C. P. 739, 740.*

18 L. 444.

- (b) But see squarely *contra* that a bond for one-half over and above is not required.

State vs. Judge, 19 L. 167; State ex rel. Stackhouse vs. Judge, 21 A. 154; State vs. Judge, 30 A. 314; State vs. Judge, 35 A. 911.

4. Bond for costs sufficient for suspensive appeal generally when no money judgment is asked. As in suits:

- (a) To prevent distribution of funds of an estate.

Heath vs. Judge, 39 A. 1042; State ex rel. Durand vs. Judge, 30 A. 283; State ex rel. Heath vs. Judge, 39 A. 1041; Heath vs. Vaught, 16 L. 513; Blanchin vs. Fashion, 10 A. 345; State ex rel. Moeler vs. Judge, 36 A. 189; Pasley vs. McConnell, 38 A. 470; Succession of Edwards, 34 A. 219; State ex rel. Executors of Boutte vs. Judge, 28 A. 871; State ex rel. Pecot vs. Judge, 27 A. 231; State ex rel. Sharp & Gellen vs. Judge, 22 A. 178; State ex rel. Eustis vs. Judge, 27 A. 685; State ex rel. Block Bros. vs. Judge, 44 A. 564; State ex rel. Gausson vs. Judge, 21 A. 44; 27 A. 185; 30 A. 314; 37 A. 428.

- (b) Wherein injunction dissolved without damages.

Malain vs. Judge, 29 A. 794; State ex rel. Durand vs. Judge, 30 A. 283; State ex rel. Williamson vs. Judge, 30 A. 815; Bauer vs. Lochte, 30 A. 683; Stafford vs. Renshaw, 33 A. 444; Hart vs. Judge, 34 A. 1211; 21 A. 152; 25 A. 653; 19 L. 171; State ex rel. Carlson vs. Judge, 28 A. 877; Hall vs. Lazarus, 34 A. 1210; 36 A. 190.

- (c) Even where judgment recognizes taxes due, when dissolving injunction of proposed tax sale.

State ex rel. Aymar vs. Judge, 35 A. 1174.

- (d) But where valuable property is tied up by injunction, and that injunction is dissolved, bond must bear some proportion to value of property and cover costs in full.

State ex rel. Coons vs. Judge, 27 A. 334; State vs. Judge, 16 L. 167; State ex rel. Vial vs. Judge, 36 A. 910.

- (e) By administrators and executors in appeals from judgments touching money in their hands.

Covle vs. Succession of Creevy, 34 A. 543; State ex rel. Durand vs. Judge, 30 A. 285; State ex rel. Smith vs. Judge, 29 A. 838; State ex rel. Pecot vs. Judge, 27 A. 231; State ex rel. Executors of Boutte vs. Judge, 28 A. 871; Millaudon vs. Percy, 7 N. S. 352; State ex rel. Hickey vs. Judge, 20 A. 108; Blanchin vs. Fashion, 10 A. 345; State ex rel. Gausson vs. Judge, 21 A. 43; Succession of Cloney, 29 A. 328.

- (f) To compel debtor to make forced surrender under R. S. 1781.

State ex rel. Muller Bros. vs. Judge, 36 A. 190; State ex rel. Beebe vs. Judge, 23 A. 31.

(g) To mandamus public officer to pay an amount of money in his hands. Money judgment means judgment execution of which is by *fi. fa.*

State ex rel. Board of Police vs. Judge, 21 A. 741.

5. Where judgment orders delivery of movables and possession of real estate, bond must equal value of movables and revenue of immovables.

State ex rel. Smith vs. Judge, 89 A. 839; State ex rel. Durand vs. Judge, 80 A. 286; State ex rel. Parks vs. Judge, 22 A. 589; 27 A. 334.

6. Devolutive appeal bond must conform to order of appeal.
Poole vs. Chaffe & Sons, 86 A. 290.

7. Bond should be sufficient to cover:

(a) Possible damages for frivolous appeal should be covered by bond.

State ex rel. Sharp vs. Judge, 22 A. 176.

(b) Accrued interest.

Poland vs. R. R. Co., 42 A. 290.

(c) Costs.

State ex rel. Vial vs. Judge, 86 A. 910.

8. Parties may fix amount of bond by consent.

State ex rel. R. R. Co. vs. Judge, 27 A. 697; Poole vs. Chaffe, 36 A. 280.

9. Bond for costs required of third person appealing should cover only his own costs.

State ex rel. Sharp & Gellen vs. Judge, 22 A. 178.

(a) But as to original parties bond should cover all costs.
Id.; Byrne vs. Riddell, 4 A. 8; 18 A. 417.

(b) What costs must be included in bond. Bond must be for all costs, those in lower court and those in appeal.

Rawle vs. Feltus, 38 A. 421; Gillis vs. Carter, 28 A. 805; Jordan vs. Sanders, 18 A. 417; Byrne vs. Riddell, 4 A. 8; Driggs vs. Ballard, 8 A. 185; Beasley vs. Allen, 9 R. 89; Ray vs. Sheehee, 24 A. 1106.

10. In contest for offices where no specific sum is adjudged due by one party to other, judge should fix bond.

State ex rel. Cain vs. Judge, 20 A. 576.

11. Bond too small for suspensive may sustain appeal as devolutive.

15 A. 838; 20 A. 340; 1 R. 324; 3 R. 68; 9 R. 185; 10 A. 818; 11 A. 687.

12. Joint bonds by several appellants: Appellants may join in one petition or motion and one bond.

Succession of Clark, 80 A. 801; Elder vs. City, 81 A. 500; 40 A. 277; 86 A. 968; State ex rel. Heath vs. Judge, 89 A. 1042; Schlieder vs. Martinez, 88 A. 847; 88 A. 470.

13. Separate bonds necessary in separate appeals from separate judgments in unconsolidated suits.

Succession of Clairteaux, 85 A. 1179; 24 A. 276.

14. What omissions not fatal to bond:

(a) Signature of appellant.

Murrell vs. Murrell & Fuller, 88 A. 1238; Sandell vs. Douglas, 25 A. 564; Ready vs. City, 27 A. 170; Lafrance vs. Martin, 17 A. 77; Granier vs. R. R. Co., 42 A. 882; Williams vs. Hood, 11 A. 118; Fish vs. Friend, 8 R. 264; Wells vs. Lamothe, 10 L. 411; Bank vs. Erwin, 6 L. 824; Vignie vs. Brady & Charpeaux, 85 A. 561; Pasley vs. McConnell, 88 A. 470; Succession of Richardson, 26 A. 187.

(b) Name of clerk of court.

Schlleder vs. Martinez, 88 A. 847; Nugent vs. McCaffrey, 88 A. 272; Marks vs. Herman, 21 A. 756.

(c) Mention of clerk's capacity.

Succession of Fuqua, 27 A. 271; Hoffman vs. Howell, 27 A. 804.

(d) Any irregularities not sufficient to prevent recourse on surety.

Pasley vs. McConnell, 40 A. 609; Gerson & Son vs. Gayle, 84 A. 588; Baldwin & Co. vs. Mumford, 85 A. 848; People's Brewing Co. vs. Boebinger, 40 A. 277; Thomas vs. Bienvenu, 35 A. 987.

(e) Omission of clause "or that the same shall be satisfied by the proceeds of the sale of his estate, real and personal."

Guton vs. Creditors, 19 A. 81; Byrne vs. Elddell, 4 A. 8.

(f) Failure of surety to state capacity, if he sign in usual place.

Coyle vs. Succession of Creevy, 84 A. 541; Brady vs. Vignie, 85 A. 581; but see Briant vs. Hebert, 80 A. 1127.

Or to insert his name in body of bond.

Union Bethel, etc., vs. Sheriff, 88 A. 1461; Coyle vs. Succession of Creevy, 84 A. 541; Holden vs. Tanner, 6 A. 74.

15. Appellant's attorney may sign.

Barnabe vs. Snaer, 16 A. 84; Granier vs. R. R. Co., 42 A. 882.

But not after death of his client.

Graham & Anderson vs. Hendricks, 24 A. 477.

- 16. Amount of bond may be in blank; surety may fill up before return day.**

Klots & Macready vs. Burke, 35 A. 597; Percy vs. Millaudon, 6 L. 586; 86 A. 751.

***After* in all cases where bond is not judicial, but purely voluntary or extra-judicial.**

Ohretien vs. Bienvenu, 41 A. 751.

- 17. What omissions are fatal to bond:**

- (a) Omission of data sufficient to identify it with judgment appealed from.**

Succession of Walker, 52 A. 525; Boutte vs. Boutte, 30 A. 177; In the matter of the Shrievalty of Pointe Coupee, 19 A. 73.

- (b) Omissions of proper conditions; e. g., that appellant shall prosecute his appeal.**

Bawle vs. Feltus, 33 A. 421; Moore, Janney & Hyams vs. Lalaurie, 27 A. 645; Simonds vs. Heinn, 22 A. 296; Champonier vs. Washington, 2 A. 1013; Succession of Calhoun, 35 A. 363; Frudhomme vs. Williams, 45 A. 484; Russ & Hollingsworth vs. Creditors, 45 A.

- (c) Shall satisfy such judgment as may be rendered against him.**

Glover vs. Taylor, 38 A. 634.

- (d) Omission of names of legal representatives of deceased appellant when appeal bond filed after his death.**

Succession of Hoggatt, 35 A. 396.

- (e) Omission of surety to sign bond.**

Slocumb vs. Williams, 23 A. 245.

- (f) Improper name of principal.**

Succession of Richardson, 26 A. 187.

- (g) But not a mere slight error not sufficient to mislead.**

Homer College vs. Vaughn, 18 A. 525; 12 L. 444; 19 L. 385; 2 A. 322.

- (h) Preparation of bond not duty of clerk; any fatal defect attributable to appellant.**

Livingston vs. White, 2 A. 902; Robert vs. Ride, 11 A. 419; 2 A. 453; Voelkel vs. Voelkel, 17 A. 639.

- 18. Deposit in lieu of bond.**

- (a) Amount in money may be deposited in lieu of bond.**

Lanata vs. Bayhl, 31 A. 229; State ex rel. Raysseignier vs. Judge, 37 A. 113.

- (b) Also municipal bonds to a sufficient sum.**

Sauer vs. Union Oil Co., 43 A. 699.

19. Waiver of appeal bond; not permitted.
Bathelor vs. Creditors, 20 A. 198; Bank vs. Barrow, 24 A. 276; but see *contra*, State ex rel. R. R. Co. vs. Judge, 27 A. 697.
20. Amount of devolutive appeal bond: fixed by court.
 - (a) Court fixes amount of devolutive appeal bond.
Beaird vs. Russ, 52 A. 804; Dwight vs. Barrow, 25 A. 424; Duperon vs. Van Winkle, 1 R. 824; Smith vs. Vanhille, 10 L. 258.
 - (b) And for suspensive appeal bond, when not fixed by law.
State vs. Judge, 22 A. 589.
21. Appellant may carry up appeal, though co-appellants acquiesce in judgment.
Webb vs. Keller, 89 A. 58; Walton vs. Police Jury, 26 A. 856; Succession of McKenna, 28 A. 870; Baker vs. Thompson, 26 A. 220; Frances vs. Lavine, 26 A. 812.
22. *New bond*:
 - (a) No new bond given after motion to dismiss.
Jordan vs. Sanders, 13 A. 417; Dunlap, Moncure & Co. vs. Price, 10 A. 155.
 - (b) Bond vitally defective not curable after it is given.
Dunlap, Moncure & Co. vs. Price, 10 A. 155.
 - (c) No new bond need be given on making others parties to appeal.
Borde vs. Erskine, 20 A. 822.
23. *Who are appellants*:
 - (a) Only those are appellants who give bond.
Baldree vs. Davenport, 7 A. 589; Davis vs. Anty, 5 N. S. 142.
24. *Rule de minimis* applies when bond is deficient by \$1.
Bodet vs. Nibourel, 25 A. 439; Miller vs. Chandler, 29 A. 89; Yale & Bowling vs. Cole, 31 A. 688.
25. Bond fixed by court sustains appeal though insufficient.
Succession of Baumgardner, 35 A. 127; Elder vs. New Orleans, 31 A. 509.
Except in cases of suspensive appeal from money judgment where amount is fixed by law.
Ricks vs. Gantt, 35 A. 920; McCarthy vs. McCarthy, 44 A. 146.
26. *Amount of bond in blank*. Amount supplied by reference to order and by application of principle that judicial bonds are construed by the law under which given.
Gibbs vs. Lum, 29 A. 526; Nugent vs. McCaffrey, 33 A. 272; Ricks vs. Gantt, 35 A. 920.

27. Condition of bond. Fixed by law; judge has no right to interpolate other conditions.

State ex rel. Roudanez vs. Lynch, 28 A. 518.

28. *Appeal by intervenor:*

Appeal of intervenor not appealing within time allowed original parties to appeal; falls with dismissal of appeal of the original party.

Landry vs. Landry, 21 A. 148; 7 N. S. 845.

29. *Whose favor bond made:*

- (a) Appeal bond favor of clerk. Act 125 of 1868 amending C. P. 575.

Johnson vs. Clark & Meader, 29 A. 54; Ward vs. Douglas, 22 A. 468; Francis vs. Levine, 26 A. 811; Webb vs. Keller, 39 A. 58; 38 A. 878.

- (b) Prior to 1868 bond was in favor of appellees.

16 A. 872; 20 A. 828; 16 A. 165; 14 A. 815; 22 A. 123; 19 A. 137, 141, 197; 19 A. 294; 20 A. 348; 21 A. 515; 20 A. 298.

- (c) In favor of appellees in proper capacity, when acting *en autre droit*.

15 A. 893; 19 A. 89; 26 A. 818; 27 A. 271, 304.

30. *Exemptions from giving bond:*

- (a) City of New Orleans.

State ex rel. Hoey & O'Connor vs. Brown, Administrator, 29 A. 53; State ex rel. Samory vs. City, 84 A. 467; State ex rel. George vs. Mount, 21 A. 177.

- (b) State and State officers.

Merchants' Mutual Insurance Company vs. Board of Assessors, 40 A. 871.

- (c) Co-appellants with city or State must give bond.

State ex rel. Mississippi and Mexican Gulf Ship Canal Company vs. Administrators, 27 A. 469.

31. *Filing of bond.* At what time bond may be filed:

- (a) May be filed before order of appeal, provided amount be sufficient.

LeBlanc vs. Rougeau, 89 A. 230.

- (b) But can not be filed in suspensive appeals after ten days. However, the bond may sustain the appeal as devolutive.

Reed vs. His Creditors, 87 A. 907; Succession of Keller, 89 A. 573; Chaffe vs. Carroll, 84 A. 122; Dwight vs. Barrow, 25 A. 424.

- (c) In devolutive appeals, bond may be filed at any time before return day.

Glover vs. Taylor, 33 A. 635.

- (d) Or even within three days of grace.

Boulligny vs. White, 5 A. 81.

- (e) Provided the return day be within the time prescribed for appealing.

Wood vs. Calloway, 21 A. 481; Mortee vs. Edwards, 20 A. 236; Mc-Waters vs. Smith, 25 A. 515.

32. *Effect of suspensive appeal:*

It suspends execution only as to person appealing. Thus appeal of principal will not stay judgment against surety on injunction bond.

State ex rel. Wilson vs. Judge, 22 A. 262; 19 A. 291; 15 A. 433; 11 A. 707; 4 A. 514; 3 A. 319.

(C) *Surety on appeal bond:*

1 Incompetent or insufficient surety:

See Act 67 of 1876, p. 109.

- (a) One whose property is not subject to seizure, such as household furniture, or whose property is in litigation.

State ex rel. Smith Bros. vs. Judge, 35 A. 738.

- (b) One whose property though liable to seizure is not within the jurisdiction of the court.

Act 24 of 1876; State ex rel. Favre vs. Judge, 28 A. 884.

- (c) Surety on injunction bond when condemned by judgment.

Moussier vs. Gustine, 25 A. 86; Dumas vs. Mary, 29 A. 808; 12 L. 888; 18 A. 659; Pasley vs. McConnell, 39 A. 1097; Barrow vs. Clack, 45 A. 481; Bowman vs. Kaufman, 30 A. 1021; Greiner vs. Prendergast, 2 R. 235.

- (d) But where the injunction was not asked in the case appealed, but one connected therewith, surety on injunction bond competent.

Pasley vs. McConnell, 39 A. 1097.

- (e) And when not condemned by judgment appealed from.

Leeds vs. Yeatman, 12 L. 883; Mehnert vs. Dietrich, 36 A. 890.

- (f) One not residing within the jurisdiction of court.

State ex rel. Zunts & Spori vs. Judge, 30 A. 50; Acts 1876, pp. 109, 50, 49; Wells vs. Walker, 24 A. 181; Bres vs. Booth, 1 A. 306; Gorasset vs. Cashell, 14 L. 245.

2. *Sufficient or competent surety:*

- (a) Surety on attachment bond, otherwise qualified, but not surety on injunction bond.

French & Co. vs. Davidson, 32 A. 718; *Dumas vs. Mary*, 29 A. 686; *Olmeo vs. Dannerheim*, 18 A. 659; 12 L. 383.

And even surety on injunction bond against whom no money judgment is asked may be surety on appeal bond.

Monssier vs. Gustine, 25 A. 37; *Mehnert vs. Dietrich*, 31 A. 390; see *Greiner vs. Prendergast*, 2 R. 236, where surety on injunction bond, though condemned, was surety on appeal bond.

- (b) Clerk of court otherwise qualified, and provided he does not file or attest bond.

Walker vs. Simon, 21 A. 669; 10 L. 423.

- (c) Surety who limits his liability, other things being equal, and provided aggregate responsibility equals legal amount of bond.

State ex rel. Roman vs. Judge, 21 A. 443; *Heirs of Gutierrez vs. Croner*, 29 A. 827; *State ex rel. Michael vs. Judge*, 21 A. 780; *Heirs of Bastabe vs. Succession of Denegre*, 22 A. 124.

- (d) Surety on release bond, if otherwise qualified.
32 A. 713.

- (e) Partner of commercial firm signing firm name, if otherwise qualified.

Allen, Nugent & Co. vs. Cary, 52 A. 1125.

- (f) Emancipated minor, otherwise qualified.

Cooper vs. Rhodes, 30 A. 534.

- (g) Principal on injunction bond may be surety on appeal for his surety on injunction bond.

State ex rel. Wilson vs. Judge, 22 A. 262.

- (h) Debtor asking respite.

Gaillard vs. Creditors, 20 A. 143.

- (i) Person possessing tangible property sufficient in value, though not real estate.

State ex rel. Fosdick vs. Judge, 27 A. 695.

- (j) Co-debtor in separate judgment in same suit, provided not co-appellant.

Coleman vs. Judge, 27 A. 234; *Riley vs. Riley*, 27 A. 243.

Aliter where each liable for judgment against other.
18 A. 659; 12 L. 383.

- (k) Agent of principal, if otherwise qualified.
Moutan vs. Whitley, 12 A. 173.
- (l) Member of Board of Police, on appeal by the board as a body.
Andrus vs. Board of Police, 41 A. 699.
- (m) But an executor in his private capacity can not be surety on appeal from judgment against him in official capacity.
Lafon vs. Lafon's Executors, 2 N. S. 571; State vs. Judge, 2 R. 449.
- (n) Surety need not qualify until his sufficiency is assailed.
State ex rel. Roman vs. Judge, 22 A. 591.

'D) Capacity of surety.

1. In what court tested:

- (a) Objection to capacity or sufficiency tested in lower court, by rule or other appropriate proceeding.

Goodrich vs. Bodley, 85 A. 525; State ex rel. Gill vs. Tissot, 84 A. 98; Weiser vs. Blaese, 84 A. 833; 20 A. 390; 29 A. 597; 33 A. 928; 32 A. 814; 28 A. 871; 22 A. 591; 21 A. 114, 115; Perrilliat vs. Fernandez, 16 A. 192; Generes vs. Fluker, 24 A. 329; State ex rel. Belden vs. Mahan, 22 A. 450; Vredenburg vs. Behan, 82 A. 477.

- (b) Appellate court can not examine sufficiency of surety.
Succession of Charnbury, 84 A. 25; Stanton vs. Surget, 10 A. 818; Tanner vs. King, 10 A. 485; Wood vs. Harrel, 14 A. 61; Edwards vs. Edwards 29 A. 597; Huppenbauer vs. Durlin, 23 A. 789.

Except on appeal from rule testing his sufficiency.

DeGruy vs. Aiken, 48 A. 799.

- (c) Lower court may order substitution of competent and sufficient surety.

Dumas vs. Mary, 29 A. 808; Benton vs. Mahan, 27 A. 649; Gray, Macmurdo & Co. vs. Lowe & Pattison, 9 A. 478.

- (d) But appellate court has no power to order new bond.
Nouvet vs. Armant, 12 A. 72; Vicksburg, Shreveport & Texas R. Co. vs. Hempkin, 15 A. 523.

- (e) New bond filed by consent sufficient.

Budd vs. Stinson, 20 A. 578.

2. *Proving sufficiency of surety:*

- (a) Burden on appellant.

Act 24 of 1876; State ex rel. Holyland vs. Judge, 85 A. 787.

- (b) Jurisprudence formerly otherwise.

State ex rel. Roman vs. Judge, 21 A. 592; State ex rel. Lynch vs. Judge, 23 A. 714; State ex rel. Hays vs. Judge, 25 A. 516; State ex rel. Smith Bros. vs. Judge, 35 A. 739; State ex rel. Menge vs. Judge, 36 A. 712; State ex rel. Favre vs. Judge, 28 A. 684; State ex rel. Mitchell, Craig & Co. vs. Judge, 21 A. 780; 21 A. 786; 22 A. 115.

3. Extent of liability of surety:

(a) In suspensive appeal, he is liable for whole judgment.
27 A. 53.

(b) In devolutive appeals, he is liable only for costs
though bond be for greater sum.

Byrne vs. Riddell, 4 A. 3.

4. Rescinding appeal for insufficiency of surety.

Remedy by appeal—not mandamus.

State ex rel. Menge vs. Judge, 36 A. 200.

5. Rule to test surety on appeal bond triable in chambers within fifteen days after service.

Act 45 of 1890, p. 83.

6. Where lower judge declares appeal devolutive and not suspensive, remedy is by prohibition, not mandamus.

State ex rel. Johnson vs. Judge, 21 A. 113; State ex rel. Stackhouse vs. Judge, 21 A. 154; State ex rel. Kearney, Blois & Co. vs. Judge, 19 A. 501. See above.

576. Suspensive Appeal Bond When Delivery of Perishable Movable Ordered—If the judgment decree the delivery of some movable of a perishable nature, the court shall require security to an amount exceeding by one-half the estimated value of such movable.

577. Amount of Bond When Decree Is for Delivery of Real Estate—But if the judgment decree the delivery of real estate, not of a perishable nature, security shall only be required to an amount exceeding by one-half the estimative value of the revenue to be derived from such real estate, pending the suit, and for such further amount as the judge may determine as surety for any injury, or deterioration which may be caused to the estate by the appellant, while in possession of the same.

1. This article does not apply to judgments touching right of servitude.

Rozier vs. Maginnis, 12 A. 108.

2. Nor to judgment affecting mere status as heir.

State ex rel. Hicky vs. Judge, 20 A. 109.

578. Devolutive Appeal—If the appeal be taken after the delays allowed by law for taking an (suspensive) appeal have expired, or if the appellant fail to furnish the security required in the preceding articles, such appeal shall not stay the execution of the judgment.

But, in that case, no security shall be required, except to such an amount as the court may determine as sufficient to secure the payment of the costs.

C. P. 532.

Devolutive waives suspensive appeal, and execution may issue before expiration of ten days.

Leggett & Bro. vs. Potter, 9 A. 309; *Hatch vs. English*, 12 R. 136.

579. Terms and Conditions of Appeal Bond—In the appeal bond, it must be set forth in substance, that it is given as surety that the appellant shall prosecute his appeal, and that he shall satisfy whatever judgment may be rendered against him, or that the same shall be satisfied by the proceeds of the sale of his estate, real or personal, if he be cast in his appeal, otherwise that the surety shall be liable in his place.

C. P. 534.

1. Sureties on appeal bond may limit liability.

Heirs of Bastabe vs. Succession of Denegre, 22 A. 124.

2. Surety's liability unlimited is equivalent to that of principal.

Oulver, Simmonds & Co. vs. Leovy, 27 A. 58.

3. Process against surety is summary.

LeBlanc vs. Succession of Massieu, 27 A. 324.

4. Unauthorized stipulations in bond will not invalidate it.

LeBlanc vs. Succession of Massieu, 27 A. 324.

5. Surety's liability is measured by judgment rendered on appeal, not judgment rendered below.

Cooper and Wife vs. Rhodes, 30 A. 533.

580. No Suspensive Appeal Lies—When—Some judgments, however, are executed provisionally, although an

appeal has been taken from the same within the delay prescribed, and the necessary surety given. Such judgments relate :

1. **Nomination of Tutors and Curators**—To the nomination of tutors and curators of minors, of persons absent or interdicted, and of vacant successions.

2. **Of Syndics**—To the appointment of syndics of creditors, when the court orders that they shall administer provisionally.

C. P. 876, 1050, 1059.

(A) *No suspensive appeal lies from :*

1. Judgment in expropriation proceedings.

C. C. 2634.

2. Judgment dismissing succession representatives.

C. C. 1160; Succession of Townsend, 87 A. 409.

3. Judgment appointing administrator:

Succession of Calhoun, 85 A. 863; Succession of Bedford, 88 A. 244.

(a) But when opponent denies necessity of administration, he may appeal suspensively from appointment of administrator.

State ex rel. Heirs of Gee vs. Judge, 26 A. 122.

(b) And so of executor.

State ex rel. Pierson vs. Judge, 22 A. 64.

4. Judgment dismissing dative executor.

State ex rel. Commagere vs. Judge, 22 A. 116; State vs. Judge, 5 A. 518;

State ex rel. Dubuisson vs. Judge, 14 A. 287; 14 A. 672.

(a) Or liquidator of partnership.

State ex rel. Dubuisson vs. Judge, 14 A. 287.

(b) Or administrator.

State vs. Judge, 5 A. 518; Byrne vs. Biddell, 4 A. 3.

(c) But suspensive appeal lies from such part of judgment as condemns dismissed administrator in pecuniary damages.

State vs. Judge, 5 A. 518.

5. Judgment discharging prisoner under habeas corpus, though imprisonment grew out of proceedings in civil actions.

But see State vs. Judge, 20 A. 580; *Ex parte Emanuel*, 4 A. 424.

6. Order enjoining certain acts as nuisances.
Jure vs. Municipality, 2 A. 522; State ex rel. Doullut vs. Judge, 29 A. 874.
7. Order removing or appointing under-tutor or tutor.
Suocession of Menendez, 29 A. 409.
8. Judgment on rule to show cause why execution should not be quashed. Injunction with bond necessary.
Wiley vs. Woodman & Bement, 19 A. 210; State vs. Judge, 9 A. 301; Levi vs. Converse, 20 A. 558; Clement vs. Oakley, 2 R. 90; Smith vs. Purves, 20 A. 279.

(B) Suspensive appeal.

1. Is allowed where not specially denied by law.
State ex rel. Cain vs. Judge, 20 A. 574; State vs. Judge, 20 A. 529; State ex rel. Bank vs. Judge, 17 A. 186.
2. *Suspensive appeal lies:*
 - (a) From *ex parte* order on creditors' petition compelling defendant to make forced surrender.
Reder & Co. vs. Maas, 34 A. 180.
 - (b) From order appointing syndic when court does not order that he shall administer provisionally.
State ex rel. Avery & Son vs. Judge, 41 A. 963.
 - (c) From order appointing executor, when any right to appoint at all is denied.
State ex rel. Pierson vs. Judge, 22 A. 61; State ex rel. Avery & Sons vs. Judge, 41 A. 963.

(C) Prohibition lies to arrest illegal proceedings subsequent to suspensive appeal

State ex rel. Menge vs. Judge, 36 A. 712.

581. Citation of Appeal—When an appeal has been taken, and security given, as directed by the court, the clerk shall deliver a copy of the petition of appeal to the sheriff, to be served on the appellee, together with a citation to appear before the court of appeal to answer within the delay hereinafter prescribed.

Appeal not dismissed:

1. For defective service.
Borde vs. Erskine, 33 A. 874; Ratcliffe vs. Creditors, 14 L. 292.
2. Or for no service at all when citation prayed for.
Nelson vs. Beard, 16 A. 303; Lewis vs. Hennen, 13 A. 259; Broussard vs. Broussard, 2 A. 769.

582. Mode of Service of Citation—The sheriff shall serve the petition and citation on the appellee, if he reside within the State, or his advocate, if he do not, by delivering a copy of the same to such appellee, or to his advocate, or by leaving it at the place of his usual domicile.

(A) Want of service or defective service waived:

1. By appearance and answer to appeal.

Foot vs. City, 20 A. 22; *Lee vs. Goodrich*, 21 A. 278; *Jones vs. Shreveport*, 28 A. 835; *Succession of Baumgarten*, 35 A. 130; *Heffner vs. Hesse & Vergez*, 26 A. 148.

2. By motion to dismiss on other grounds.

Lee vs. Goodrich, 21 A. 278; *Succession of Baumgarten*, 35 A. 127.

3. By acceptance of service.

Wood & Roane vs. Wood, 32 A. 801.

4. And attorneys of non-resident may acknowledge service.

Payne vs. Ferguson, 23 A. 581.

(B) Service on attorney:

1. It is only when appellee is non-resident that service may be made on attorney, but sheriff's fault in making such service on attorney of resident appellee will not prejudice appellant.

Borde vs. Erskine, 33 A. 874; *Jeffreys & Sons vs. Phillips*, 23 A. 207; 11 A. 429.

2. Act 78 of 1878, page 129, amends Art. 582 C. P., so as to read: "The sheriff shall serve the citation of appeal on the appellee, if he reside in the State, and on his advocate if he do not, and in default of advocate on curator *ad hoc*, or by leaving it at the place of his usual domicile."

(C) Service on agent:

1. When appellee is non-resident, service on agent is invalid; service should be on attorney.

Parker vs. Davis, 21 A. 157; 4 L. 817.

2. Prior to Act 78 of 1878 service on curator *ad hoc* was ineffectual.

Stevenson vs. Edwards, 24 A. 266.

3. Service on attorney of resident appellee invalid.

Borde vs. Erskine, 29 A. 822; *Ratliff vs. Creditors*, 14 L. 232; *Jeffreys & Sons vs. Phillips*, 23 A. 207.

(D) Time of service:

Premature issuing of citation and service thereof before filing of bond not a ground for dismissal of appeal.

Beebe vs. Guinault, 29 A. 796.

583. Citation of Appellee—Return Day of Appeal—

The appellee must be cited to appear before the court of appeal at its next term, if there be sufficient time for doing so after allowing the same delay which is granted to defendants in ordinary suits; and if there be no sufficient time to admit of the appellee having this delay, owing to the distance from his domicile to the place where the court of appeal is held, he shall be cited to appear before the same at the subsequent term.

C. P. 883.

(A) Citation of appellee:

1. Citation of appeal necessary when appeal is by petition, and trial elsewhere than place to which appellee is cited is a nullity.

State ex rel. Baldwin vs. Treasurer, 27 A. 29.

2. Citation essential, except when appeal is by motion at same term.

Potter vs. Thibodeaux, 21 A. 618; Tupery vs. Lafite, 19 A. 296; Martin vs. Taylor & Pinckard, 21 A. 303; McKowen vs. Atkinson, 19 A. 186; Schmidt vs. Benit, 17 A. 74; Pratt vs. Erwin, 5 A. 115; Succession of Holmes, 18 A. 626; Bolling vs. Anderson, 10 A. 650; Hermann vs. Rivers, 9 R. 2; St. Romes vs. Macarty, 21 A. 277.

3. Who must be cited:

(a) Only parties appellee need be cited.

Fish vs. Johnson, 16 A. 29.

(b) All necessary parties to appeal must be cited.

Miltnerberger vs. Estate of Pipes, 23 A. 267; Succession of Perret, 17 A. 302.

4. Want of necessary parties not cured by request to restrict effect of decision to parties only.

Succession of Pollock, 22 A. 574.

5. Citation in proper capacity. Appellee must be cited in capacity in which he is sued.

Camutz vs. Bank, 20 A. 85.

6. Erroneous citation. Time allowed to correct erroneous citation where appellant is without fault.

Hearing & Greig vs. Insurance Company, 29 A. 332; Guerin vs. Bagneries, 9 L. 472; Walker vs. Simon, 21 A. 669.

7. Curator *ad hoc* to receive citation. Appointment of curator *ad hoc* to receive citation of appeal not authorized.

Stevenson vs. Edwards, 24 A. 266.

Aliter since Act 78 of 1878.

8. Nor is service on agent of non-resident appellee valid.

McIntosh vs. McLeod, 21 A. 465; *McMicken vs. Smith*, 5 N. S. 428; 4 L. 817.

9. Service of citation on wife. Sufficient if served on her alone, where husband had authorized the suit.

Mrs. Marie Emella Thezan vs. Thezan, 28 A. 442; *DeBlanc vs. Levasseur*, 26 A. 541.

But it seems husband must be mentioned in citation of appeal.

Reese vs. Conyers, 16 A. 40; 7 L. 112.

(B) Return day of appeal:

1. In criminal cases, within ten days, and forfeiture of appearance bond in criminal case.

Act 30 of 1878; *State vs. Cassidy*, 7 A. 276; *State vs. Williams*, 57 A. 200; *State vs. Jenkins*, 86 A. 866.

2. In cases involving right to office, appeal returnable in ten days.

Act 45, E. S. 1870, Sec. 7; *Wooten vs. LeBlanc*, 52 A. 692; *State ex rel. Slack vs. Hall*, 26 A. 58.

3. Judge usually fixes return day.

Dejean vs. Stilly, 13 A. 563.

4. As to return day for various parishes.

Act 69 of 1884, p. 92; Act 34 of 1890, p. 28; Act 12 of 1894; *Minor vs. Budd*, 87 A. 709.

5. Legal delay. Requisite legal delay must be given to appellee.

Picard & Weil vs. Prival, 85 A. 870; *State ex rel. Baldwin vs. Treasurer*, 25 A. 29.

6. Power of judge to fix different return day. When there is not time to prepare transcript, judge can fix other return day.

Bartoll vs. Huguenard, 89 A. 413; *State vs. Judge*, 9 A. 14; *Brabazon vs. City*, 28 A. 64; Section 47 of Act 45 of 1870; *Goodwyn vs. Perry & Co.*, 25 A. 293; 12 A. 526; 14 A. 787.

7. Improper return day suggested by appellant works dismissal of appeal.

Picard & Weil vs. Prival, 85 A. 871; *Wooten vs. LeBlanc*, 52 A. 692; *State ex rel. Lee vs. Jumel & Burke*, 85 A. 981; *State vs. Clinton*, 27 A. 540; *Citizens' Bank vs. Board of Liquidation*, 27 A. 542; *Trimble vs. Brichta*, 10 A. 778; 8 L. 220; 12 L. 460; *Citizens' Bank vs. Ruty*, 26 A. 747; but see *contra Chaffe & Sons vs. Heyner*, 81 A. 595, and dissenting opinion of Fenner, 32 A. 696.

But where erroneous return day is not suggested by counsel, but by judge, appeal not dismissed.

Bartoli vs. Huguenard, 89 A. 414.

8. Certainty of return day. Designation as "first Monday of July, 1878," is sufficient.

Succession of Gayle, 27 A. 547.

(a) Correction of error in return day by lower judge is legal.

Cramer vs. Brown, 26 A. 272.

(b) But he has no power to extend return day.

State vs. Judge, 11 A. 728.

584. Return of Service of Citation of Appeal—The sheriff must make his return on the back of the petition, stating how the same was notified to the appellee, in the same manner as when a defendant is cited to appear before a court of original jurisdiction, and deliver or transmit the same to the clerk of the court of appeal, before the expiration of the term at which the appellee has been cited to appear.

O. P. 200, 587.

585. Transcript of Appeal—After the appeal has been allowed, and the surety given, the clerk of the court, from whose judgment the appeal is taken, shall, except in cases of appeal from the parish courts to the district courts, make a transcript of all the proceedings, as well as of all documents filed in the suit, and annex to the same the petition of appeal, in order that the same may be delivered to the appellee when demanded.

(A) Transcript of appeal:

1. Records in appellate court properly designated by number, title and other descriptions may be considered, by agreement, copied in transcript.

Succession of Irwin, 83 A. 64; *Vredenburg vs. Behan*, 82 A. 563; *Washburn vs. Frank*, 81 A. 429; *Ins. Co. vs. Costa*, 82 A. 2; *Bouquille vs. Dede*, 9 A. 291.

2. Defective transcript remedied by *certiorari*, not by application for rehearing.

Becas vs. Smith, 84 A. 189.

3. Cost of transcript. Appellant primarily responsible for costs of appeal and clerk may compel payment before delivery of transcript.

Act 24 of 1872.

- (a) Prior to Act 24 of 1872, appealing plaintiff was required to pay for transcript.

State vs. Behrens, 17 A. 67; State vs. Phelps, 6 R. 308.

- (b) But appealing defendant was not.

State vs. Clerk, 22 A. 563; State vs. Clerk, 22 A. 573, 586.

- (c) Act 8 of 1894 compels stenographer to make duplicate copies of testimony, to be used in making transcript, without extra cost.

4. Number of transcripts. Any number may be made to complete record.

Vredenburg vs. Behan, 32 A. 563; Washburn vs. Frank, 31 A. 477.

5. Only one of several appellants need bring up transcript.

Succession of Touzaune, 36 A. 420.

6. What transcript need contain:

Only those documents or papers necessary for trial of case between parties to appeal.

Succession of Townsend, 36 A. 536.

7. Transcript need not contain:

Original petition of appeal. Copy suffices.

Burns vs. Naughton, 24 A. 476.

8. Client's duty is simply to copy; he can not make evidence by adding matters.

Starke vs. Bossier, 19 A. 180.

586. Trials of Appeals De Novo—All appeals from the parish courts to the district courts shall be tried *de novo*. All the testimony taken in writing in the parish court shall be used as evidence in the district court, and all the original papers, with the evidence of every kind which is in writing, with the suit, shall be sent up on the appeal, which shall stand in place of a transcript.

The laws relative to suspensive and devolutive appeals from judgments in the district courts shall be applicable to appeals from judgments in the parish courts, and the party appellant shall file the papers in the district court on or before the first day of the next term of said district court.

(Inoperative.)

587. Transcript Filed on Return Day—The appellant

must return the said petition of appeal and the transcript of the proceedings into the court of appeal, on the return day thereof.

(A) Filing of Transcript:

1. Appeal dismissed if transcript not filed on return day, or within extension of time when such obtained.

Pierce vs. Cushing, 33 A. 401; Buckley vs. Lecroix, 14 A. 29; Wagner vs. Hagan, 9 A. 538; Pond vs. Horton, 7 L. 176; R. R. Co. vs. Hood, 8 A. 226; McDowell vs. Peck, 5 A. 42; Bonnabie vs. Walter, 5 A. 744; Leon vs. Wolf & Bro., 9 A. 65; Holmes vs. Brown, 6 A. 294; Penny vs. Somerville, 3 A. 668; Dwight vs. McMillin, 4 A. 350; Annis vs. Purvis, Wood & Co., 5 A. 716; Ducourman vs. Levistones, 2 A. 245; Succession of Logan, 4 A. 279; Rhea vs. Steamer, 15 A. 712; Cousin vs. Johnson, 21 A. 210; Moriere vs. Robinson & Jones, 20 A. 229; McDonogh vs. De-Gruys, 10 A. 75; Farmers' Association vs. Strawbridge, 24 A. 126.

2. But when no term of court is held, filing record at subsequent term will suffice.

State vs. Evans, 11 A. 626.

(B) Extension of return day:

1. Extension will be granted when transcript is not ready, appellant being without fault.

Massey vs. Helme, 15 A. 692.

2. Extension must be granted before delay has expired.

Succession of Bergold, 23 A. 874.

(C) Judge fixes return day: When:

Judge may fix return day when blank is left for that purpose.

Bank vs. Legendre, 35 A. 787; Lacher vs. R. R. Co. 28 A. 320.

588. Failure to File Transcript—If the appellant neglect to file in the appellate court the copy of the record and the accompanying papers within the time thus fixed, the appellee may apply one of the modes mentioned in the two following articles, either to have execution on the judgment or final judgment on the appeal.

C. P. 844.

Failure to file transcript:

1. Extension of time to file transcript does not carry the usual three days of grace.

Van Hoven vs. Van Hoven, 48 A. 1171; Bienvenu vs. Insurance Company, 28 A. 901; Sun Mutual Insurance Company vs. Bynum, 32 A. 28; Lacroix vs. Bonin, 33 A. 119; Pierce vs. Cushing, 33 A. 401; Succession of Gast, 42 A. 91.

2. Failure to file transcript is abandonment of appeal.

Sterling vs. Heirs of Sterling, 35 A. 340; *Pierce vs. Cushing*, 33 A. 319; *Ducourneau vs. Levistones*, 4 A. 30; 3 A. 245; *Brickell vs. Conner*, 10 A. 235; *Collins vs. Monticou*, 9 A. 39; *Tarleton vs. Wofford*, 15 A. 332; *Redmond vs. Mann*, 29 A. 149.

But where failure is merely to file transcript containing suspensive appeal, and devolutive appeal is subsequently taken within prescriptive period, appeal is not abandoned as devolutive.

Bowie vs. Davis, 33 A. 345; *Verges vs. Gonzales*, 33 A. 414; *Johnson vs. Clark & Meader*, 29 A. 752; 27 A. 244; 11 L. 390; 15 A. 116.

589. Execution on Certificate of Abandonment of Appeal—If the appellee prefers having execution on the judgment, he may, within three days after the time allowed for the appellant to file the record, obtain a certificate from the clerk of the appellate court, declaring that the record has not been brought up, and on the production of this certificate in the lower court, it shall award execution on the judgment, which then becomes irrevocable.

See *Succession of Andrews*, 16 A. 340.

Appellant may at any time before citation of appellee abandon appeal and issue execution on judgment.

Savole vs. Thibodaux, 29 A. 52; *Snider vs. Collins*, 30 A. 1236.

590. Judgment at Instance of Appellee—If the appellee prefers to have judgment on the appeal, he may obtain a copy of the record from the lower court, and bring it up to the appellate court, and may pray for judgment, or for the dismissal of the appeal, in the same manner as if the record had been brought up by the appellant.

C. P. 884.

(A) Dismissal of appeal:

Motion to dismiss waived:

1. By asking amendment of judgment.

Jacobs vs. Yale & Bowling, 39 A. 359.

2. By taking up case on merits.

3 R. 163; 3 R. 169; *Clafin & Co. vs. Liso & Sheen*, 31 A. 171; 6 N. & S.

3. By filing answer though motion to dismiss pending.

Clafin & Co. vs. Lisso & Sheen, 81 A. 171; Jones vs. Shreveport, 28 A. 885.

4. By request for fixing of case for trial.

Golden vs. Board of School Directors, 84 A. 885; White vs. Maguire, 16 A. 887; Creevy vs. Breedlove, 12 A. 745; Temple vs. Marshall, 11 A. 618; O'Reilly vs. McLeod, 2 A. 188.

(B) Contents of motion to dismiss:

Original motion to dismiss must state all grounds and no subsequent motion, or rule, allowed to show fault of appellant not seasonably urged.

Succession of Edwards, 84 A. 220.

(C) Notice of motion:

Notice of motion to dismiss must be given, and posted notice without name of appellant's counsel not sufficient.

Mutual Insurance Company vs. Costa, 82 A. 5.

(D) Who may move to dismiss:

One improperly made party to appeal can not demand dismissal.

Boutte vs. Boutte, 80 A. 181; Succession of Tyson, 21 A. 117.

591. Appearance and Answer of Appellee—If the appeal have been duly returned on the return day, the appellee must appear within the delay above prescribed, and file his answer, praying that the judgment of the inferior court be affirmed, and the appellant decreed to pay the costs.

C. P. 887 and notes.

592. Prayer for Amendment by Appellee—Nevertheless, if the appellee complain of some parts of the judgment of the inferior court, he may, without appealing from the same, pray it to be set aside in those points in which he believes that he is aggrieved.

C. P. 888, 887, 889, 890.

1. This article applies only where all the parties have been cited, and all the issues tried in first instance are appealed from.

Girod vs. Creditors, 2 A. 546.

2. Amendment of judgment must be asked in answer to appeal, not in brief only.

State vs. Becker, 30 A. 682; 5 A. 140; 5 A. 38; 5 A. 683; 1 A. 340.

593. Prescription of Appeal—No appeal will lie, except as regards minors, after a year has expired, to be computed from the day on which the final judgment was rendered, if the party claiming the same reside in the State, and after two years, if he be absent therefrom.

This delay, as relates to minors, must be computed from the day of their becoming of age.

O. P. 567, 572, 573, 1133.

(A) Prescription of appeal:

1. Except in cases hereafter specified, devolutive appeal prescribed by one year: which commences to run—

.(a) From notification, where judgment is by default, without personal service.

Verges vs. Gonzales, 33 A. 414; Hoffman vs. Howell & Riley, 7 A. 304; Taylor vs. Woodward, 25 A. 218; Hoffman vs. Howell, 7 A. 304; Holbrook vs. Bronson, 25 A. 51.

(b) From time of notice, in executory process.

Lombas vs. Robichaux, 14 A. 105; State vs. Judge, 16 A. 332; Billet vs. Henry, 2 A. 145.

(c) From adjournment of court in the country parishes.

Phillips vs. Her Creditors, 37 A. 71.

(d) From time of filing decree with clerk and notice by him thereof, to party or advocate, when judgment is rendered in chambers.

Act 72 of 1884.

(e) From signing of judgment in contradictory proceedings after personal citation.

Hall vs. Beggs, 17 A. 238; Webb vs. Keller, 35 A. 930; 39 A. 390.

2. As to absentees, right of appeal prescribed by two years from signing.

Consolidated Association vs. Mason, 24 A. 518; Schmidt & Ziegler vs. National Bank, 22 A. 314; Lambert vs. Conrad, 18 A. 145; Succession of Martin vs. Succession of Hoggatt, 37 A. 340.

Even when after death, non-resident is represented by resident administrator.

Succession of Martin vs. Succession of Hoggatt, 37 A. 342.

3. *As to minors*, right of appeal is prescribed by one year, computing from majority; but where tutor, executor or administrator fails to appeal within legal delay, minor heir coming of age can not appeal.
West vs. Davis, 84 A. 857; Audat vs. Lutey, 12 R. 523; Prejean vs. Robin, 14 A. 801.
4. As to suspensive appeal—prescription is ten days.
Boyd vs. Labranche, 85 A. 285.
5. And notice of judgment may be served at domicile, even as to married woman.
Holbrook vs. Bronson, 25 A. 51; 12 L. 600.
As to notice of judgment by justice of the peace.
See State ex rel. Henderson vs. Justice, 39 A. 21.
6. What days not counted: Not counting Sundays, nor day when judgment signed, nor that when delay expires.
Tupery vs. Edmondson, 29 A. 851.
7. No interruption of prescription of appeal:
Ashbey vs. Ashbey, 41 A. 111; Griffing vs. Bowman, 8 R. 115; Hall vs. Beggs, 17 A. 289; Knox vs. Duplantier, 21 A. 294; Bealrd vs. Russ, 84 A. 518.
 - (a) But time for appealing suspended by proceedings through mandamus to compel granting appeal.
Ready vs. City, 27 A. 169.
 - (b) Rule to set aside order of seizure and sale.
Abrams vs. Jay, 16 A. 873.
 - (c) See *id.* in actions of nullity.
C. P. 612; St. Romes vs. Navigation Co., 24 A. 531.
 - (d) And in Federal courts where such cause as civil war suspended right of appeal.
The Protector, 9 Wall. 687; Hanger vs. Abbott, 6 Wall. 582.
8. Second appeal must be within prescriptive period.
Smith vs. Vanhille, 11 L. 390; Dugas vs. Truxillo, 15 A. 116; Heirs of Hoover vs. Hoover, 85 A. 574; Yeatman vs. Lennox, 8 Peters, 123; 19 How. 162.
9. Appeal in divorce cases. Thirty days allowed.
Holbrook vs. Bronson, 25 A. 51; Acts 1871, p. 151.
10. Appeal in criminal cases—must be obtained at same term as judgment rendered, and returnable in ten days.
State vs. Burns, 38 A. 563; Acts 1878, No. 80.

11. *When appeal considered as taken:* asking appeal and filing of bond are initial points of taking appeal. Citation may be served *after* prescriptive period.

Ulman & Co. vs. Briggs, Payne & Co., 52 A. 655; Boutte vs. Boutte, 8 A. 181; Borremire's Case, 10 L. 150; Bowie vs. Davis, 33 A. 347; Gibson vs. Selby, 2 A. 630; Mortee vs. Edwards, 20 A. 236; Bank vs. Fortier, 27 A. 244.

But see to effect that in Federal courts bond may be filed after prescription has run.

The Dos Hermann, 10 Wheat. 806.

12. *Can prescription barring appeal be waived?*

See in negative Brooks vs. Morris, 11 How. 204; Uterelner vs. Miller, 29 A. 485.

But see to the effect that time for appealing may be extended by consent.

State ex rel. R. E. Co. vs. Judge, 27 A. 697.

13. *Prescription of appeal applies:*

(a) *To appellee, who must file transcript within the year if he wishes judgment thereon under O. P. 592.*

City vs. Adams, 28 A. 15.

(b) *To one appealing even from judgment in his own favor, as when appeal is taken from judgment obtained under Act 11 of E. S. 1875, which requires validity of certain questioned bonds and warrants to be determined by the Supreme Court as a prerequisite to a legal exchange of same by Board of Liquidation for bonds authorized to be issued by said board under Act 3 of 1874.*

Charles vs. Board of Liquidation, 87 A. 176; State ex rel. Meyer vs. Same, 33 A. 126; Jardet vs. Same, 40 A. 879.

594. No Withdrawal of Appeal Except by Consent—Renewal of Appeal—From the moment when the citation of appeal is served on the appellee, the appellant can not withdraw his appeal; and whether the appellee obtain the rejection of the appeal by producing the record from the court below, or prosecute execution on the judgment appealed from, on the certificate of the clerk that the record has not been brought up by the appellant, the appeal shall be considered as abandoned, and the appellant shall not be afterward allowed to renew it.

O. P. 491, 532, 901.

(A) Renewal of appeal: When not permitted:

1. When appellant fails to file transcript in time.

Redmond vs. Mann, 24 A. 149; Dwight vs. McMillen, 4 A. 350; Jenks vs. Bond, 3 A. 339; Collins vs. Monticou, 9 A. 39; Dozier vs. Sargent, 4 L. 41; Roberts vs. Benton, 1 R. 100; Williams vs. LeBlanc, 15 A. 591; Succession of Andrews, 16 A. 340; Sharkey vs. Bankston, 22 A. 119; Brickell vs. Connor, 10 A. 325; 4 L. 41; Landry vs. Landry, 21 A. 143; Sterling vs. Sterling, 35 A. 340; 31 A. 358; 33 A. 410; 33 A. 345; Pierce vs. Cushing, 33 A. 310; Succession of Llula, 42 A. 475; 22 A. 209; Ducourneau vs. Levistones, 3 A. 245; Succession of Logan, 4 A. 279; Copley vs. Routh, 3 A. 139; R. R. Co. vs. Hood, 3 A. 226; Laussade vs. Maury, 31 A. 358; Tarleton vs. Wofford, 15 A. 592; World's Exposition vs. R. R. Co., 39 A. 355; Bienvenu vs. Ins. Co., 32 A. 209.

2. When appellant fails to give sufficient suspensive appeal bond, and no other kind of appeal was allowed.

Johnson vs. Clark & Meader, 29 A. 762.

3. When prior appeal by same party has taken up judgment in its entirety.

Codery vs. Waterworks Co., 42 A. 441.

4. When suspensive appeal is abandoned, devolutive appeal is not thereafter allowed.

Laussade vs. Maury, 31 A. 358; Collins vs. Monticou, 9 A. 39; Ducourneau vs. Levistones, 4 A. 30.

(B) When renewal permitted:

1. When second order of appeal is granted within time for appealing, and prior appeal not abandoned.

Mortee vs. Edwards, 20 A. 236; Dugas vs. Truxillo, 15 A. 116; Smith vs. Vanhille, 11 L. 332; Pierce vs. Cushing, 33 A. 401; John vs. Clark & Meader, 29 A. 762; Verges vs. Gonzales, 33 A. 410.

2. When appeal sent to wrong court.

McWilliams vs. Michel, 43 A. 934.

3. When appellee has not been cited.

White vs. Maguire, 16 A. 337.

4. When first appeal was from unsigned judgment.

Association vs. Mason, 24 A. 513.

5. When bond not yet given though order obtained; filing bond initial step toward appealing.

Bank vs. Fortier, 27 A. 244; Mortee vs. Edwards, 20 A. 236; Bowie vs. Davis, 33 A. 347.

6. When appeal not heard on merits, or was premature.

Hall vs. Beggs, 17 A. 233; Succession of Planchet, 29 A. 520.

7. When suspensive appeal dismissed for insufficiency of transcript, devolutive appeal may be taken in one year.

State ex rel. Cremonini vs. Baton Rouge, 85 A. 1108; Verges vs. Gonzales, 83 A. 415; 15 A. 116; 27 A. 244; Bowie vs. Davis, 33 A. 348; Bowman vs. Kaufman, 81 A. 198; State ex rel. Soares vs. Hebrew Congregation, 31 A. 205.

- (C) *Curator ad hoc* can not waive right of appeal directly or indirectly.

Bienvenu vs. Ins. Co., 83 A. 209.

- (D) *Separate appeals may be allowed:*

1. To different appellants.

Bowman vs. Kaufman, 80 A. 1021.

2. From injunction of executory process, and from process itself when grounds are different.

Pargoud vs. Richardson, 80 A. 1286.

595. Withdrawal and Renewal of Appeal—But if the appellant wishes to withdraw his appeal before he has cited the appellee, he may be allowed to do so, on motion to the lower court; and in such case he may renew his appeal within the time herein above allowed.

C. P. 801.

1. By special legislation, plaintiff contestant for office may discontinue suit pending in any of the courts of this State on paying costs.

Act 40 of 1873, p. 80.

2. When appellee is cited jurisdiction attaches, and appeal can not be abandoned even by consent. Consent neither confers nor divests jurisdiction.

State ex rel. Graham vs. Judge, 44 A. 598; Succession of Andrews, 16 A. 840.

But before citation appeal may be withdrawn.

White vs. Maguire, 16 A. 837; Savole vs. Thibodaux, 29 A. 52; Snider vs. Collins, 80 A. 1237.

596. Proceedings Against Surety—If, on the execution of the judgment of the appellate court, there is not sufficient property of the appellant to satisfy the judgment and costs, the appellee may obtain judgment against the surety given by the appellant; provided, that no suit shall

be instituted against such security, until the necessary steps shall have been taken to enforce payment against the principal.

O. C. 8066; C. P. 575, 579, 727, 726.

(A) Proceedings against surety on appeal bond. Extent of liability: His liability can never exceed:

1. That of principal.

Gilbert vs. Meriam, 2 A. 162; Parham vs. Cobb, 9 A. 426; Friedman Bros. vs. Lemle, 38 A. 656.

But in suspensive appeals, the surety's liability extends to amount mentioned.

Simon, Culver & Co. vs. Leovy, 27 A. 58; Diamond vs. Pettitt, 3 A. 87.

2. Nor can his liability exceed the terms of judgment rendered in suit in which he is surety; hence he will not be liable—

(a) For amount of original judgment, when his obligation is given in suit for nullity of said judgment.

Greiner vs. Prendergast, 8 A. 889.

(b) For incidental damages, as when a slave sues for freedom and is cast, his surety liable for costs and for surrender of slave, but not for value of his services pending the litigation.

Cartwright vs. McMillan, 8 A. 687.

(c) Or where third person appeals suspensively from judgment peremptorily mandamus sheriff to accept bond tendered for release of attachment and where bond for appeal is to satisfy whatever judgment may be rendered against appellant, surety's obligations not held to embrace obligation to satisfy judgment which had been rendered against sheriff or pay general damages of appeal.

Friedman vs. Lemle, 38 A. 656.

(d) For amount of judgment appealed from but only for amount of judgment rendered on appeal.

Cooper and Wife vs. Rhodes, 30 A. 533; Diamond vs. Pettitt, 3 A. 89; Holmes & Sanwich vs. Steamer Belle Aire, 5 A. 523; Wilson vs. Churchman, 6 A. 469.

(B) Abandonment of appeal will not relieve surety.

Camponier vs. Washington, 2 A. 1013; Simonds vs. Hein, 22 A. 296.

(C) When surety is bound:

1. Surety is not bound until final judgment rendered. Hence not bound when case merely remanded.

Wilson vs. Churchman, 6 A. 469.

2. Nor will sureties be bound where appeal heard, though lower court had rescinded appeal on proof that sureties were insufficient.

Agelasto vs. Mills, 80 A. 1846.

(D) Prior steps against principal usually necessary:

1. Return *nulla bona* against principal is usually necessary.

Folger vs. Palmer, 85 A. 815; Chalaron vs. McFarlane, 9 L. 230.

2. When prior demand and return *nulla bona* against principal not necessary:

(a) Where principal has removed from parish.

Guay vs. Andrews, 8 A. 141; Cooper vs. Rhodes, 80 A. 535; Simonds vs. Hein, 22 A. 296.

(b) Where principal has gone into bankruptcy.

Wogan vs. Thompson, 10 A. 284.

(c) Where principal is dead.

DeBlanc vs. Levasseur, 26 A. 543; Lepretre vs. Barthet, 25 A. 124; Alley vs. Hawthorne, 1 A. 122; Trimble vs. Birchta, 11 A. 271; Murison vs. Butler, 20 A. 513; Wells vs. Roach, 10 A. 545; Bourgeat vs. Adams, 11 A. 78.

(d) Where appeal bond is given on appeal from decree for executory process, only mortgaged property could be sold.

Whann vs. Irwin, 27 A. 706; Landry vs. Victor, 80 A. 1042.

(e) Where demand is vain or impossible, as when principal debtor has made cession or has died.

Alley vs. Hawthorne, 1 A. 126.

(f) Where property of principal is heavily incumbered.

Folger vs. Palmer, 85 A. 814.

(E) Where appellant fails to file transcript, execution may issue, and surety be held on failure to collect from principal.

Moore, Young & Hyams vs. Lalaurie, 27 A. 645; Champonier vs. Washington, 2 A. 1013.

(F) Return of nulla bona:

1. Sheriff's return conclusive until successfully traversed.

Pinard vs. George, 80 A. 885.

2. And mere allegation of prematurity of return, with no proof of injury, will not help surety.

Yale & Co. vs. Doll, 28 A. 718; *Pinard vs. George*, 30 A. 337; *Holmes & Sanwich vs. Steamer Bell Aire*, 5 A. 523; *Simonds vs. Hein*, 22 A. 293.

(G) Recital of returns:

Return must show demand on debtor, and then, failing, upon plaintiff in execution to point out property.

Levois vs. Thibodaux, 13 A. 264; *Gayoso vs. Hieky*, 4 L. 301; *Conway vs. Jones*, 17 L. 416; *Lynch vs. Burr*, 10 R. 133; *Alley vs. Hawthorne*, 1 A. 123; *Perkins vs. Bard*, 16 A. 444; *Gray vs. Andrews*, 8 A. 141; *Shepherd vs. Stewart*, 20 A. 191; *Wells vs. Boach*, 10 A. 544; *Bourgeat vs. Adams*, 11 A. 78; *Simonds vs. Hein*, 22 A. 293.

(H) Defences of surety. He can show:

1. That a legal sale of his principal's property could have satisfied judgment; or that fraud of plaintiff prevented such satisfaction.

Lafayette Ins. Co. vs. Remmers, 30 A. 1349.

2. That he is not surety for partner, but for the firm, when he is sought to be held as surety for former.

Grief vs. Kirk, 17 A. 25; *Anderson vs. Arnette*, 30 A. 74.

3. He can not urge:

(a) Grounds which might have been a valid defence to original action, such as that the obligation grew out of illicit enterprise.

Morrison vs. Butler, 20 A. 512.

(b) That appellant did not sign the bond.

Anderson vs. Arnette, 30 A. 74.

597. Foregoing Rules Govern Appeal to Supreme Court

—The rules provided in the preceding articles shall govern all appeals to the Supreme Court, whether the same be taken from judgment rendered by district courts or parish courts.

598. Appeals from Parish Courts—Appeals taken from the judgments of parish courts shall be tried *de novo*, that is to say, that each of the parties shall be allowed to produce new evidence, and to have their witnesses examined again.

C. P. 1129; 42 A. 73.

(Inoperative since abolition of parish courts.)

599. Testimony Taken in Parish Court Reduced to Writing—Nevertheless, if the testimony given before the parish court be taken in writing, and has been sent with the records to the district court, the party in whose favor such testimony was given may use the same before the district court, without being obliged to produce the witnesses in person.

(Inoperative.)

600. Rules of Practice in Supreme Court—The rules of practice, to be observed by the Supreme Court, are hereby prescribed in a particular title, and the two following articles.

601. Clerk Must at Request Take Down Testimony—Either party may require the clerk to take down the testimony in writing, which shall serve as a statement of facts, if the parties should not agree to one.

C. P. 1042.

602. Statement of Facts—When the deposition of witnesses have not been taken in writing in the inferior court, the party intending to appeal, or his advocate, must require the adverse party or his advocate, to draw, jointly with him, a statement of the facts proved in the cause, and this statement thus drawn and signed, either by the parties or their advocates, shall be annexed to the records, and a transcript of the same transmitted to the Supreme Court.

C. P. 694.

(A) Statement of facts: When made:

1. Statement of facts may be made after taking of appeal.

State ex rel. Boudreaux vs. Judge, 18 A. 495; *Jones vs. Neville*, 9 R. 478; *Meeker vs. Galpin*, 4 R. 269; *Union Bank vs. Williams*, 16 L. 236; *Trenchard vs. Elderkin*, 8 L. 294; 6 Wall. 111.

2. Not after filing of bond.

Logan vs. Winder, 22 A. 233; 8 L. 455; 16 L. 236; but see *contra Hill & Co. vs. Tippet*, 10 A. 554.

3. And can not be exacted of judge at subsequent term when his recollection no longer enables him to make it.

Lucas vs. Bell, 10 A. 180; Henri vs. Francineux, 81 A. 856.

(B) Duty of appellant:

1. Appellant should see to making statement of facts, and appeal dismissed when none in record.

* Cooley vs. Broad, 29 A. 71; Majolre vs. Barbin, 25 A. 667; Johnson vs. Spearing, 15 L. 232.

2. But where stenographer fails to transcribe notes, appeal not dismissed, but case remanded for a new trial.

Nicholls vs. Harris, 32 A. 647.

(C) When statement of facts necessary:

Statement of facts is necessary and absence thereof works dismissal of appeal, where evidence was given in lower court and parties and judge could not agree.

Henri vs. Francineux, 81 A. 856; Roberts vs. Benton, 1 R. 100; Boller vs. Day, 16 L. 261; Clark vs. Laidlaw, 4 R. 880; Thayer vs. Littlefield, 5 R. 152; Thomason vs. Baum, 6 L. 123; Virges vs. Gonzales, 33 A. 410.

(D) When not necessary.

1. When face of papers sufficiently show issues involved.

Parish of St. Martin ex rel. Baker vs. Delahoussaye, 30 A. 1092.

2. When errors of law alone are relied on and seasonable assignment of errors is filed.

Succession of Townsend, 36 A. 447.

3. When the appeal is to court of appeals on law points alone.

State ex rel. Harmony Club vs. Judge, 42 A. 1083.

(E) Certiorari:

Certiorari useless when testimony was not taken down and appeal will be dismissed.

Clark vs. Laidlaw, 4 R. 880; Thayer vs. Littlefield, 5 R. 152; Roberts vs. Benton, 1 R. 100.

603. Court Shall Make Statement When Parties Disagree—If the adverse party, when required to do so, refuse to join in making out the statement of facts, or if the parties can not agree as to the manner of drawing the same, the court, at the request of either, shall make such statement according to their recollection of the facts, or from the notes they have taken of the evidence.

G. P. 898.

It is only after refusal of adverse party to join in making statement that judge can be called in.

Castaing vs. Stone, 4 A. 18.

SECTION III.

Of the Nullity of Judgments.

604. Nullity of Judgment—One may demand the nullity of a judgment for any of the causes provided in this section, even if no appeal have been taken from the same, or if the delay for taking the same have expired.

(A) No action of nullity where remedy is by appeal.

Esterbrook & Gallier vs. Gauche, 27 A. 86; Blanck vs. Speckman, 28 A. 146; Taliaferro vs. Steele, 14 A. 166; Gilmore vs. Gilmore, 9 A. 208; Seymour vs. Cooley, 9 L. 79; 22 A. 871; but see Cookfield vs. Toures, 24 A. 168, where both remedies allowed simultaneously; see also State ex rel. Falzer vs. Judge, 33 A. 928; 30 A. 879; 12 A. 736; 28 A. 147.

B) Direct action necessary; no collateral attack unless nullity is apparent on face of record.

Bajourin vs. Ramelli, 35 A. 788; Billgery vs. Billgery, 34 A. 889; Davis vs. Greer, 32 A. 426; Gusman vs. DePoret, 33 A. 887; Landes vs. Brent, 10 How. 848.

C) Judgments of courts seized of jurisdiction are not collaterally attackable, e. g.:

1. Judgment of ejectment.

Huyghe vs. Brinkman, 34 A. 831.

2. Judgment granting respite.

Anderson vs. Duson et als., 35 A. 917.

3. Judgment appointing administrators and executors.

Duson, Curator, vs. Dupre et al., 35 A. 896.

4. Order appointing judge ad hoc.

State ex rel. Williams vs. Constable, 33 A. 1413; Guilbeau vs. Cormier, 32 A. 980; State ex rel. Fendeson, 28 A. 82; State ex rel. Mestayer vs. Debaillon, Judge, 36 A. 830.

5. Judgment appointing provisional syndic.

Cloutier vs. Lemee et al., 35 A. 305; Succession of Altemus, 32 A. 364; Succession of Dugas, 30 A. 268.

6. Judgment of partition.

Paul vs. Lamothe, 36 A. 318; 14 A. 656; 22 A. 871; Bayhi vs. Bayhi, 35 A. 529.

7. Judgment recognizing homestead.

Calvit vs. Williams, 35 A. 322.

8. Judgment accepting surrender and ordering meeting of creditors.
Bajourin vs. Ramelli, 35 A. 783.
9. Judgment however erroneous when defects are only latent.
Bledsoe vs. Erwin, 33 A. 618, and cases cited; Compton vs. Sandford, 30 A. 833.
10. Judgment appointing tutor.
Succession of Garrison, 15 A. 27; Caillebeau vs. Ingrouf, 14 A. 623.
11. Judgment appointing liquidator.
Southern Mutual Ins. Co. vs. Pike, 33 A. 823.
12. Judgment adjudicating community property.
Succession of Robinson, 23 A. 17; Sanderson vs. Carson, 2 A. 394.
13. Order of recusation.
State ex rel. Mestayer vs. Judge, 36 A. 823.
14. Judgment appointing tutrix.
Succession of Hawkins, 35 A. 591; Kent vs. Brown & Learned, 38 A. 812, 813.
15. Judgment of separation in property.
Lewis vs. Peterkin, 39 A. 731; Farwell vs. O'Neal, 22 A. 619; Dinkgrave vs. Norwood, 10 A. 564; Brown & Learned vs. Smythe, 40 A. 825.
16. Judgment appointing under-tutor.
Succession of Keller, 39 A. 590; Succession of Winn, 3 R. 305; Hoover vs. Sellers, 5 A. 182; Thibodaux vs. Thibodaux, 5 A. 598; Martin vs. Jones, 12 A. 168; Tutorship of Hughes, 13 A. 590; Caillebeau vs. Ingrouf, 14 A. 623; Succession of Hawkins, 35 A. 593; Succession of Sadler vs. Henderson, 35 A. 823.
17. Judgment in opposition to tutor's account.
Tutorship of Heirs of Byland, 33 A. 738.
18. Judgment appointing syndic.
Cloutier vs. Lemee, 30 A. 305.
19. Judgment against administrator.
Succession of Quin, 30 A. 948; Succession of Neal, 25 A. 125.
20. Judgment of revival rendered contradictorily with assignee of bankrupt debtor.
Ludelling vs. Chaffe, 40 A. 643.
21. Award of arbitrators.
Peniston vs. Somers, 15 A. 673.
22. Judgment adjudicating property to surviving wife.
Fendler vs. Daigre, 19 A. 130.
23. Judgment by wife confessing claim.
Bell vs. Francke & Danneel, 23 A. 599.

(D) Collateral attack permissible:

1. Where judgment is absolute nullity:

(a) As when rendered against a dead man *eo nomine*.

Edwards vs. Whited, 29 A. 647.

(b) And where court is without jurisdiction *ratione materis*.Alter vs. Pickett, 24 A. 515; Bernard vs. Vignaud, 1 N. S. 8;
Quine vs. Mayes, 2 R. 510; Williams vs. Clarke, 11 A. 761;
Simpson vs. Hope, 23 A. 557; Succession of Durand, 24 A. 253;
Richardson vs. Hunter, 23 A. 255; Stevenson vs. Elser, 23 A. 421.
D'Arcy vs. Ketchum, 11 How. 165; Webster vs. Reed, 11 How. 437.(c) But want of jurisdiction *ratione personarum* may be waived.

Peroni vs. Riley, 59 A. 802.

2. Where judgment homologating tutor's account is attacked by third persons.

Succession of Triche, 84 A. 1148.

3. Will and order of execution, as to third persons. It is purely *ex parte* and can not support plea of *res judicata*.Dalton vs. Wickliffe, 85 A. 355; Succession of Lampton, 34 A. 419;
Sophie vs. Duplessis, 2 A. 774; Succession of Duplessis, 10 R. 128;
Arston vs. Arston, 15 A. 137; Fuentes vs. Gaines, 25 A. 86; Succession of Lampton, 35 A. 419.

4. Judgment absolutely null for defects patent on face of record.

2 How. 169; 11 A. 546; Bledsoe vs. Erwin, 33 A. 618; Bajourin vs. Ramell, 35 A. 788.

e. g., null for want of citation.

Conery vs. Rotchford, Brown & Co., 20 A. 694; 21 A. 26; 1 N. S. 9;
24 A. 252; 11 A. 761.*(E) Other modes of procedure resulting in annulling judgments:*1. By proceeding under *certiorari* in Supreme Court.

State ex rel. Marrero vs. Judge, 35 A. 215.

2. By revocatory action, as in case debtor attempts to defraud creditor by collusively proceeding under cover of judicial power.

Succession of Britto vs. Succession of Fabre, 34 A. 248; Fenossy vs. Gonsoulin, 11 L. 424; Landry vs. Marchais, 6 A. 87; Van Wickie vs. Garret, 14 A. 106; Brown vs. Brown, 30 A. 966; Tritchell vs. Bordelon, 9 R. 192; Clark vs. Christine, 12 L. 894; Jack vs. Harrison & Co., 2 A. 736.

3. By opposition to revival when judgment is absolutely null.

Conery vs. Rotchford, Brown & Co., 34 A. 522; Folger & Son vs. Slaughter, 33 A. 342; Bledsoe vs. Erwin, 33 A. 615; Hammett vs. Sprowl, 31 A. 526; Marbury vs. Pace, 30 A. 1330; Drogu vs. Moreau, 23 A. 178; McStea vs. Rotchford, Brown & Co., 29 A. 69; Levy vs. Calhoun, 24 A. 415; Laurent vs. Beelman, 30 A. 363; King vs. Pickett, 52 A. 1006; Conery vs. Rotchford, 30 A. 692.

4. By petitory action to recover property sold in execution of judgment null on face of record.

Bledsoe vs. Erwin et al., 33 A. 615.

5. By action of nullity of sale or *dation en paiement* against third persons holding fraudulent title from judgment debtor. Such third persons, if not parties to original suit, may plead prescription or make any valid defence as original debtor might have done before judgment.

Pecot & Co. vs. Armelin Bros., 21 A. 667; Fox vs. Fox, 4 A. 135; Lopez' Heirs vs. Bergel, 2 L. 200; Dumas vs. Lefebvre, 10 R. 399.

6. By writ of prohibition, as where writ of mandamus has issued where court has no jurisdiction to issue it.

State ex rel. Fernandez vs. Houston, 34 A. 875.

(F) *Not strictly actions of nullity:*

1. Cognate with the action of nullity is the action to have judgment declared inoperative and void for subsequent change in those conditions which were the motive of judgment.

(a) As where judgment declaring certain property exempt from seizure, as homestead, becomes iniquitous and unjust by change in condition of party sufficient to destroy claim to homestead.

Denis vs. Gayle, 40 A. 286; 18 A. 249; 3 A. 646; Davidson vs. City of New Orleans, 34 A. 170.

(b) As where decree of separation of bed and board is nullified by reconciliation.

Succession of Liddell, 22 A. 9.

(c) In such action judgment constitutes *res judicata* only as to matters and things existing at date of judgment.

Lemunier vs. McCearly, 37 A. 133; Davidson vs. City of New Orleans, 32 A. 1248; Calvitt vs. Williams, 35 A. 322.

(G) *Res judicata in action of nullity:*

1. Judgment rendered in action to annul previous judgment is *res judicata* of grounds alleged in nullity and bars application by *certiorari* to annul same judgment for same reasons.

State ex rel. Marrero vs. Judge, 35 A. 214.

2. But judgment sought to be annulled can not be set up as *res judicata*.

Heroman vs. Louisiana Institute of Deaf and Dumb, 34 A. 813; Holbrook vs. Holbrook, 32 A. 15; Edward's Case, 29 A. 599; Grivot vs. Louisiana State Bank, 31 A. 468; Denegre vs. Denegre, 33 A. 692; Lazarus vs. McQuirk, 42 A. 199; Anderson vs. Denham, 40 A. 338.

But it can after lapse of time for annulling.

Grivot vs. Louisiana State Bank, 31 A. 468.

3. Where, however, only ground alleged in nullity is error of decision on issues involved, judgment operates as a conclusive estoppel.

Heroman vs. Institute for Deaf and Dumb, 34 A. 813.

4. The estoppel extends to every issue determined in the cause.

Aurora vs. West, 7 Wall. 102; 2 A. 462; 19 L. 318; 5 N. S. 664; 11 M. 607; 14 L. 233; 5 N. S. 170.

(H) *Who may bring action to annul:*

Third person having interest.

Willis vs. Peet, 26 A. 156; Walworth vs. Stevenson, 24 A. 251.

(I) *Parties to action to annul:*

All parties to original judgment are necessary.

Bell vs. Silbernagel, 28 A. 589; Willis vs. Peet, 26 A. 156; 21 A. 729; Morris vs. Bienvenu, 30 A. 879.

And only such parties can be brought in.

Winn vs. Dickson, 15 A. 273.

(J) *Burden of proof:*

Burden on plaintiff in action of nullity.

Howell vs. City, 28 A. 681; Graydon vs. Justus, 24 A. 222.

Aliter, where judgment in favor of wife against husband is attacked.

Darcey & Wheeler vs. Labennes, 31 A. 405; DeBlanc vs. DeBlanc, 4 L. 19; Malone vs. Kitching, 10 A. 85; Phelps vs. Rightor, 15 A. 83.

(K) *No action of nullity lies pending suspensive appeal involving same issues.*

Morris vs. Bienvenu, 30 A. 873.

(L) *Annulling judgment is judicial not legislative function.*

Lanier vs. Galatas, 18 A. 175.

(M) *Judgment conclusive until annulled. It can not be utterly ignored.*

Calvitt vs. Williams, 35 A. 322; Davidson vs. City, 34 A. 170.

605. Causes of Nullity—The causes for which the nullity of a definitive judgment may be demanded are 'two-fold: those that are relative to the form of proceeding, and those that appertain to the merits of the question tried.

606. Vices of Form—The vices of form for which a judgment can be annulled are the following:

1. Judgment Against Person Not Sui Juris and Not Represented—If a judgment has been rendered, even contradictorily, against a person disqualified by law from appearing in a suit, as a minor without the assistance of his curator or tutor, or a married woman without the authorization of her husband or of the court;

2. Want of Citation—If the defendant, although qualified to appear in a cause, have been condemned by default, without having been cited;

3. Incompetency of Judge Ratione Materiæ—When the judgment, though clothed with all the necessary formalities, has, nevertheless, been given by a judge incompetent to try the suit, either owing to the amount in dispute, or to the nature of the cause;

4. No Joinder of Issue—If the defendant has not been legally cited, and has not entered appearance, joined issue, or had not a regular judgment by default taken against him.

O. P. 208, 210.

(A) Vices of form. Above cases are exclusive:

No action of nullity for vices of form other than those enumerated; cases specified are exclusive. Cases specified in O. P. 607 are merely illustrative.

Blanck vs. Speckman and Wife, 23 A. 146.

(B) What judgment may be annulled:

1. Revived as well as original judgment may be annulled.

McCutohen vs. Askew, 34 A. 341; Folger & Son vs. Slaughter, 33 A. 342; Hammett vs. Sprowl, 31 A. 526; Marbury vs. Pace, 30 A. 1330; McStea vs. Ratchford, Brown & Co., 29 A. 69; Drogu vs. Moreau, 23 A. 173.

And judgment may be annulled for radical defects by defence in action to revive.

82 A. 1006; 87 A. 716; 88 A. 529; 84 A. 840; 83 A. 341; 84 A. 520.

2. Judgments against unauthorized married women.

Adie vs. Anty, 5 A. 633; Delacroix vs. Hart, 24 A. 141; Saunders vs. Burns, 88 A. 868.

3. When defendant has been condemned by default without citation.

Walworth vs. Stevenson, 24 A. 253; Morris vs. Bailey, 15 A. 2; Madden vs. Fielding, 19 A. 505; Leblanc vs. Perroux, 21 A. 26; Jacobs vs. Frere, 28 A. 625.

Or pending an exception.

18 A. 629

4. Judgment rendered by judge incompetent *ratione materis*.

Sorrels vs. Stamper, 27 A. 620; Champlin vs. Gordon, 21 A. 333; Edwards vs. Edwards, 21 A. 610; Hartman vs. Rentrope, 21 A. 662.

And subsequent investiture of jurisdiction will not cure nullity.

Mora vs. Kuzac et al., 21 A. 754.

5. Judgment against defendant not legally cited, and against whom no regular judgment by default was taken.

Conery vs. Rotchford, Brown & Co., 84 A. 522; Morris vs. Bailey, 15 A. 1.

Appearance by agent of firm is not appearance by members individually, and judgment against them nullity.

Conery vs. Rotchford, Brown & Co., 84 A. 522; Johnson's Executors vs. Brown, 18 A. 386; Conery, vs. Rotchford, Brown & Co., 80 A. 684.

6. Judgment on defective citation null where no appearance is made.

Michie vs. Brown, 20 A. 75; Walworth vs. Stevenson, 24 A. 251; Lowery vs. Erwin, 6 R. 192, 203; 21 A. 269, 26; 15 A. 2; 19 A. 505.

7. Judgment where no default was taken prior to confirmation.

Washington vs. Hackett, 19 A. 146; Elggin & Co. vs. Merchants' Bank, 19 A. 373; Taylor vs. Littell, 21 A. 663; Huntington vs. Bank, 18 A. 334.

8. Judgment where evidence was on file but not introduced.

20 A. 106; 20 A. 547.

9. Judgment rendered for a sum due as price of slave.

Consolidated Association of Planters vs. Blanc, 25 A. 226; Wainwright vs. Bridges, 19 A. 234; Grover vs. Clarke, 21 A. 567.

(C) Judgment may be in part valid, in other part invalid:

1. As where wife obtains against her husband money judgment and separation in property with full administration of her separate estate.

Vickers vs. Block, Brittin & Co., 31 A. 672.

607. Fraud, Ill Practices, etc.—A definitive judgment may be annulled in all cases where it appears that it has been obtained through fraud or other ill practices on the part of the party in whose favor it was rendered; as if he had obtained the same by bribing the judge or the witnesses, or by producing forged documents, or by denying having received the payment of a sum, the receipt of which the defendant had lost or could not find at the time, but has found since the rendering of the judgment.

C. P. 846.

(A) Illustrative, not exclusive:

Above enumerated instances are illustrative, not exclusive.

Blanck vs. Speckman, 23 A. 146; *Swain vs. Sampson*, 6 A. 800; *Tristoe vs. Norris*, 3 A. 646.

(B) For what causes action of nullity lies: Fraud or ill practices:

1. Judgment of divorce annulled for fraud or ill practices.

Bryant vs. Austin, 36 A. 808.

2. Judgment against wife on her confession when debt is community's, or husband's.

Strother vs. Hamlet et al., 28 A. 839.

(a) Wife is not estopped by such confession.

Baines vs. Burbridge & Co., 15 A. 628; *Bisland vs. Provosty*, 14 A. 166; *Erwin vs. McCalop*, 5 A. 173; *Bauregard vs. Husband*, 7 A. 294.

(b) Wife may enjoin execution.

Id.; and *Daney and Wife vs. Cobb & Co.*, 23 A. 823.

3. Judgment rendered on false documents, or when instrument on which based has been paid and fact of payment concealed.

Marcy vs. Praeger, 34 A. 54; *Noyes vs. Loeb*, 22 A. 48; *Beauchamp vs. McMicken*, 7 N. S. 607.

4. Judgment rendered on debt having illegal consideration—

e. g., a slave.

Lindstrum vs. Ewing, 25 A. 520.

But generally discovery of better defence after judgment no cause for annulling.

Merchants' Mutual Ins. Co. vs. Pointer, 22 A. 620; *Towles vs. Conrad*, 3 R. 69; *Grounux vs. Abat*, 7 L. 17; *Broussard vs. Bernard*, 17 L. 216; *Mahan vs. Bank*, 26 A. 85; *Gallagher vs. Michel*, 26 A. 41; *Robichaud vs. Wilson*, 28 A. 578; 3 A. 208.

5. Judgment decided on plea—*e. g.*, prescription, surreptitiously filed after submission of case, and without knowledge of opposing party.

Gayarre vs. Millaudon, 23 A. 305.

6. Judgment of separation in property between husband and wife, and the judgment is charged by creditor as collusive and fraudulent, and burden on wife to sustain validity.

Friedlander vs. Brooks, 35 A. 741.

7. Judgment rendered against surety who after issue joined has paid amount for which he signed the bond.

Florat vs. Handy et al., 35 A. 817.

8. Judgment obtained by fraud or ill practices, where a court of equity would interfere.

Chinn vs. Murry, 1 R. 523; Norris vs. Fristoe, 3 A. 646; Swain vs. Sampson, 6 A. 799; Perry vs. Rue, 31 A. 287; Lazarus vs. McQuirk, 3 A. 201; United States vs. Throckmorton, 98 U. S. 61; Noyes vs. Loeb, 24 A. 48; Beauchamp vs. McMicken, 7 N. S. 607; Noyes vs. Loeb, 23 A. 13.

9. Judgment where defendant was not cited and unauthorized attorney appeared.

Marvel vs. Manouvrier, 14 A. 8.

(C) For what causes and by whom action of nullity will not lie:

No action lies:

1. To annul judgment of separation in property by subsequent creditors, except for absolute nullities.

Brown and Learned vs. Smythe, 40 A. 325.

2. To annul judgment of emancipation at instance of emancipated minor over protest of third persons who have dealt with him as such.

Tullis vs. Watson, 36 A. 616.

3. To annul judgment on prescribed note, when that defence was not made.

28 A. 578; 29 A. 698; 26 A. 35, 41.

4. To annul judgment rendered against plaintiff guilty of gross laches and where grounds of defence were known before trial.

Millaudon vs. Gordon, 18 A. 280; Lanfear vs. Mestier, 18 A. 497; Tristoe vs. Norris, 3 A. 646; Swain vs. Sampson, 6 A. 800; Garlick vs. Beece, 3 L. 101; McMicken vs. Millaudon, 2 L. 180; Winn vs. Womack, 15 A. 273; Lockett vs. Toby, 10 A. 714; Shields vs. Lanna, 10 A. 193; Dwight vs. Rich, 4 A. 210; 9 R. 177; McRae vs. Purvis, 12 A. 85; Succession of Lehren, 31 A. 213; Ins. Co. vs. Pointer, 22 A. 620; Chinn vs. Municipalty, 1 R. 523; Perry vs. Rue, 31 A. 287; Elder vs. City, 31 A. 580; Goodrich vs. Hunton, 31 A. 582.

663. Nullity Demanded From Court Rendering Judgment or on Appeal—The nullity of judgment may be demanded from the same court which has rendered the same, or from the court of appeal before which the appeal from such judgment was taken, pursuant to the provisions hereafter expressed.

C. P. 604, 606.

(A) Before what court action brought:

1. Usual rule is that action of nullity must be brought before court which rendered judgment.

State ex rel. Williams vs. Judge, 42 A. 73; Jeffries vs. Iron Works, 15 A. 19; Arthurs vs. Sheriff, 43 A. 416, 417; Chandler vs. Judge, 48 A. 823; 15 A. 279; 81 A. 467; 81 A. 825; 81 A. 100; 32 A. 1245; Goodrich vs. Hunton, 29 A. 872; Galbraith vs. Snyder, 2 A. 498; Butman vs. Forshay, 21 A. 165; 30 A. 1228; 30 A. 1350; 15 A. 27; 21 A. 165.

2. Injunction forbidding execution of judgment in advance of issuance or application for issuance of writ of execution amounts to action of nullity which must be brought before court rendering judgment.

State ex rel. Kelfer Bros. vs. Judge, 84 A. 89; Stevenson vs. Weber, 29 A. 108; Goodrich vs. Hunton, 29 A. 875.

(B) Exceptional Cases:

1. Where sale under void order of seizure and sale is sought to be annulled.

Harrod vs. Voorhies, 16 L. 250; Humphreys vs. Brown, 19 A. 158; Stapleton vs. Butterfield, 34 A. 822.

2. Where action in nullity is merely incidental, it follows main demand though latter be made before other court than that which rendered judgment.

Bledsoe vs. Erwin, 33 A. 615; Clark and Husband vs. Hebert, 15 A. 279; Trichel vs. Bordelon et al., 9 R. 192; Clark vs. Christine, 11 L. 394; Rachal vs. Rachal et al., 1 R. 115.

Thus injunction may issue from New Orleans court arresting execution there of judgment rendered in Natchitoches seizing a claim and advertising for sale in New Orleans, and nullity of judgment of Natchitoches court may be shown.

Jack vs. Harrison & Co., 34 A. 738; Arenstein vs. Weber, 21 A. 199; Giffen, Smedes & Co. vs. Manning, 19 A. 206; Coleman vs. Brown, 16 A. 110; Copley vs. Edwards, 5 A. 648; Hobgood vs. Brown, 2 A. 823; Galbraith vs. Snyder, 2 A. 492; 8 M. 61; Lawes vs. Chinn, 4 N. S. 288; Police Jury vs. Michel, 4 A. 84.

3. Where action to annul is brought not by one of the original parties but by a creditor or a third person.

Trichel vs. Bordelon, 9 R. 192; *Clark vs. Christine*, 12 L. 394; *Angele de Sentmanat vs. Soule*, 83 A. 611.

(C) *District Court can not annul judgment of Supreme Court.*

Ex parte Dubuque et al., 1 Wall. 69; *Succession of Martin vs. Succession of Hoggatt*, 87 A. 840; *Melancon vs. Broussard*, 2 L. 8; but see *Grivot vs. Bank*, 31 A. 468; *Dissenting Opinion of Todd, J.*, 87 A. 840; 10 A. 18; 6 A. 553; *Rook vs. Williams*, 18 A. 374; *Heirs of Stafford vs. Renshaw*, 83 A. 445; see *Edwards vs. Whited*, 29 A. 647.

(D) *Action of nullity not removable:*

1. Action to annul not removable to Federal courts.

Barrow vs. Hunton, 99 U. S. 84; *Goodrich vs. Hunton*, 29 A. 372; *Bank vs. Turnbull*, 16 Wall. 195; *Dunn vs. Clark*, 8 Peters 1; *Freeman vs. Howe*, 24 A. 460; but see *Gaines vs. Fuentes*, 92 U. S. 10.

(E) *Supreme Court can not annul its own judgment. No original jurisdiction for that purpose.*

Walker vs. Barelli, 32 A. 1159; *Melancon vs. Broussard*, 2 L. 8.

But where Supreme Court exercises *original jurisdiction*, its judgments are reviewable on new trial, action of nullity, rescission, etc.

Lazarus vs. McQuirk, 42 A. 194.

609. Nullity Demanded on Appeal—The nullity can be demanded on the appeal, only while the appeal is still pending, an when the nullity is apparent on the face of the records.

C. P. 604.

Nullity of judgment declared on appeal.

Champlin vs. Bakewell, 21 A. 353; *Riggin & Co. vs. Bank*, 19 A. 373; *Shannon vs. Goffe*, 15 A. 96; *Angele de Sentmanat vs. Soule*, 83 A. 611.

610. Nullity Must be Demanded by Petition and Citation—The party praying for the nullity of a judgment, before the court which has rendered the same, must bring his action by means of a petition; and the adverse party must be cited to appear, as in ordinary suits.

C. P. 190, 604, 616.

(A) *By petition and citation:*

1. Regular action by petition when nullities not patent.

Bayhi et al. vs. Bayhi et al., 85 A. 529.

2. Suit for nullity can not be brought by way of intervention or third opposition.

Woolfolk vs. Woolfolk, 80 A. 189.

3. A rule not proper remedy to cause transfer of mortuary proceedings from one parish to other where succession is also opened; effect would be to annul the judgment of appointing executrix or administratrix.

Ex parte Lefranc, 77 A. 668; *Succession of Lee*, 28 A. 28; but see *Planters' Association of Louisiana vs. Blanc*, 25 A. 227, where judgment for price of slaves was erased from mortgage office on rule.

(B) By defence for radical nullities:

1. Judgment may be annulled for radical defects by defence to action to revive or to enforce.

King vs. Pickett, 82 A. 1006; *In re Board of Administrators*, 87 A. 816; *Stackhouse vs. Zantz*, 86 A. 529; *McOutehen vs. Askew*, 84 A. 840; *Folger vs. Slaughter*, 88 A. 841; *Conery vs. Rotchford et al*, 84 A. 526; *Marbury vs. Pace*, 80 A. 692; *Laurent vs. Beelman*, 80 A. 692; *Drogu vs. Moreau*, 28 A. 178; *Clark vs. Hebert*, 15 A. 279; *McStea vs. Rotchford*, 20 A. 69; *Hammett vs. Sprowl*, 81 A. 826.

2. And judgment of separation from bed and board may be annulled on defence of action for divorce thereon.

Dasplé vs. Ehringer, 82 A. 1174.

(C) Ex parte annulment of judgments:

Judgment can not be set aside by judge *ex parte*.

Bajourin vs. Ramelli, 84 A. 554; *Ins. Co. vs. DeBlanc*, 81 A. 109.

611. Nullity Demandable Though No Appeal is Taken

—Though there has been no appeal within the delay prescribed by law, the nullity of the judgment may yet be demanded by means of an action brought before the court which has rendered the same, within the delay hereafter provided.

C. P. 604, 618.

612. Nullity for Want of Citation—Failure to Oppose

Execution—The nullity of a judgment rendered against a party without his having been cited, or by an incompetent judge, even if all the formalities of the law have been observed, may be demanded at any time, unless the defendant were present in the parish, and yet suffered the judgment to be executed without opposing the same.

The same rule shall govern, as regards a defendant not qualified to appear in a suit where judgment has been given against him, if he suffer the judgment to be executed against his property without opposing the same.

C. P. 567, 604.

1. Opposition to execution of judgment must not be *mere protest* but a *suit*.

Camos vs. Sewell et al., 34 A. 1096; *Parson vs. Henry*, 43 A. 307.

But married woman can not be estopped by failure to oppose execution of judgment during her coverture and she or her legal representative may urge nullity of judgment.

Edwards vs. Edwards, 29 A. 600; *Succession of Andrus*, 34 A. 1065; *Bienvenu vs. Prieur*, 28 A. 758; *Darcy vs. Martin*, *Cobb & Co.*, 23 A. 818; *Baines vs. Burbridge*, 15 A. 628; *Medart vs. Fasnach*, 15 A. 651; *Bowman vs. Kaufman*, 30 A. 1021.

2. Voluntary execution or acquiescence bars action of nullity.

Succession of Corrigan, 42 A. 69; 3 A. 646; 6 A. 799; *Stackhouse vs. Zuntz*, 41 A. 425.

613. Prescription of Action to Annul on Ground of Fraud—When a judgment has been obtained through fraud on the part of the plaintiff, or because the defendant had lost or mislaid the receipt given to him by the plaintiff, the action for annulling such judgment must be brought within the year after the fraud has been discovered, or the receipt found.

C. P. 611.

(A) *Prescription of action of nullity:*

1. Continuous resistance to enforcement of judgment interrupts prescription from running against action of nullity.

Widow St. Bomes vs. Canal and Navigation Company, 24 A. 331.

2. But *semble* pendency of appeal does not suspend prescription.

Weber vs. Frost, 22 A. 848.

3. But prescription does not run against action of nullity when defendant was incapable of standing in judgment, *e. g.*, a minor.

DeMoss vs. Cobb, *Manlove & Co.*, 25 A. 337; 25 A. 98; 5 A. 218; 21 A. 603.

(B) Prescription one year in cases of fraud:

Action of nullity for fraud prescribed by one year running from time of knowledge of fraud.

Bowell vs. O'Neal, 24 A. 522; Burlon vs. Waggaman, 28 A. 481; Van Winkle vs. Garrett, 14 A. 106; Frere vs. Mentz, 23 A. 546; Bory vs. Knox, 38 A. 379; Peyroux vs. DeBlano, 24 A. 260; Shields vs. Chase, 32 A. 410; Parker vs. Scrogin, 11 A. 629; 28 A. 625; Lazarus vs. McQuirk, 42 A. 199; Robiohauz vs. Nelson, 28 A. 578.

(C) Plea of prescription not applicable:

1. When consideration of judgment was slave consideration.
Lindstrum vs. Ewing, 26 A. 520; 21 A. 688.
2. When surety on executor's bond brings suit to have bond canceled when blanks therein had been filled up in pursuance of order thereto by judge.
Chretien vs. Executor, 41 A. 780.

(D) Initial point of current of prescription:

1. Prescription of action by husband's creditor to annul separation of property between husband and wife is one year from date of creditor's judgment.
Darcy & Wheeler vs. Labennes, 31 A. 404; Well vs. Sheriff, 20 A. 247.
2. Prescription does not run on an unsigned judgment.
Ferguson vs. Chastant, 35 A. 435.
3. Prescription runs from day judgment became final on appeal.
Scott vs. Seelye, 39 A. 749.
4. Prescription runs from date of judgment.
Shields vs. Chase, 32 A. 409; Stevenson vs. Weber, 29 A. 105; Grivot vs. Bank, 31 A. 467.
5. Prescription of action to annul judgment for fraud runs from date of discovery of fraud and is only interrupted by service of citation, not by mere filing of suit.
Duplessis vs. Steward, 36 A. 779; Stafford vs. Smith, 6 L. 91; Byrne vs. Creditors, 33 A. 198.

But see to the effect that interruption dates from filing of petition.
Satterly vs. Morgan, 33 A. 848; Smith vs. Taylor, 10 R. 133.
6. Refusal to believe charges of fraud will not affect question of knowledge of fraud.
Bory vs. Knox, 38 A. 379; 6 A. 800.
7. Nor will laches of party in failing to investigate when clearly put on inquiry.
Millaudon vs. Gordon, 18 A. 230; Lanfear vs. Mestier, 18 A. 507; Winn vs. Womack, 15 A. 273.

SECTION IV.

*Of the Rescission of Judgments.***614. Rescission of Attachment Judgments by Absentee**

—A judgment may be reversed, if it has been rendered on an attachment against a person absent, and who had no knowledge of the action having been brought against him; if such person show that he was not indebted, either for the whole, or for part of the sum for which the judgment was obtained and his property sold.

But this action shall be prescribed after two years have elapsed from the date of the judgment.

Rescission of judgments:

1. The fact that a defendant is an absentee, had no notice of action brought against him, no debt was due, are good grounds for action of nullity and rescission of judgment.

Keith vs. Renard & Co. et al., 18 A. 735; 5 A. 400.

2. Third person whose property has been attached in suit against debtor as held under simulated title may rescind judgment if he be absentee, had no knowledge of suit and he is also to disprove validity of claim against debtor from whom he holds title.

Dumas vs. Lefebvre, 10 R. 401; *Fose vs. Fose*, 4 A. 125; *Judson vs. Connelly*, 5 A. 400; *Keith vs. Renard & Co.*, 18 A. 735.

615. Causes for Rescission by Minor—A judgment rendered against a minor may be rescinded if such minor show either that his cause has not been well defended, or that he has been aggrieved by such judgment.

But that action shall be prescribed if four years have elapsed after the minor has arrived at the age of majority; nor can it be brought by the curator or the tutor during the minority of their ward; provided, that this article shall not be taken or construed to imply the nullity of a judgment where a minor has been regularly represented in a suit according to law.

1. Judgment against tutor is judgment against minor and he can not avoid it in settlement of accounts unless he prove that he was not well defended.

McWilliams vs. McWilliams, 15 A. 88.

2. New tutor appointed vice one removed can not stand in judgment by which former tutor seeks cancellation of bond. This discharge can not be had before majority of minor. Action spoken of in C. P. 615 applies to judgments obtained against tutor pending tutorship for alleged debts of minor. Stafford vs. Villain, 10 L. 829; Kellar vs. Ridgeley, 9 A. 42.

616. Rescission Must be by Petition and Citation—The action for rescinding judgment of which this section treats, must be pursued by presenting a petition to the court by which such judgment was rendered, and the adverse party must be cited as in ordinary suits.

C. P. 610.

CHAPTER VI.

OF THE PROCEEDINGS IN EXECUTION OF JUDGMENT.

SECTION I.

General Provisions.

617. What Courts Execute—The execution of judgments belongs to the courts by which the causes have been tried in the first instance, whether such judgments have been affirmed or reversed on appeal.

(A) Judgments against City of New Orleans:

1. Act 5 of 1870 "limits and restricts the power of courts to issue writs of mandamus and *hæri facias* against the city of New Orleans and the officers thereof, and declares the effect and prescribes the mode of satisfying judgments for money against the city of New Orleans."
2. *How judgment satisfied:* Section 2 provides that final judgment against city fixes amount of demand, and plaintiff causes certified copy of judgment, of plaintiff's petition and

defendant's answer, and certificate of clerk as to finality and executory character of judgment, to be filed with controller or auditing officer who registers judgment, and warrants on treasurer.

3. No *fi. fa.* against city of New Orleans.

Act 5 of 1870; *Rousseau vs. City*, 35 A. 556; *New Orleans vs. Raloff*, 28 A. 708; *Gallena vs. Amy*, 5 Wall. 705.

4 Registry with controller is prerequisite to further proceedings to satisfy judgments. Therefore plaintiff can not in same action obtain judgment and an order compelling city officers to levy and collect tax sufficient to pay judgment.

Browne vs. City of New Orleans, 35 A. 51; *State ex rel. Ranger vs. City of New Orleans*, 32 A. 428; *Louisiana vs. New Orleans*, 125 U. S. 208.

Under ordinary circumstances rule is otherwise.

State ex rel. DeLeon vs. City, 34 A. 477.

5. Neither district court nor Supreme Court has jurisdiction to issue mandamus to municipal officer of New Orleans for purpose of drawing money from treasury, and that whether claim be liquidated by judgment or otherwise.

State ex rel. Klein et al. vs. City, 35 A. 781; *State ex rel. Straus vs. Brown*, 30 A. 80; *State ex rel. Fernandez vs. Houston*, 34 A. 575.

6. Where judgment has been registered and budget provides no payment, creditor has remedy by mandamus to compel payment for contract indebtedness arising prior to Act 1870.

State ex rel. Carriere vs. City, 36 A. 633; *Louisiana vs. New Orleans*, 102 U. S. 208; *Wolf vs. Same*, 108 U. S. 356; *State ex rel. Ranger vs. New Orleans*, 34 A. 1142.

7. But he can not have mandamus to satisfy money judgment in any other way than by payment in money as provided by law. Thus no mandamus lies to municipal officer and board of liquidation to satisfy judgment in improvement bonds though law provided that original debt should be so paid.

State ex rel. Bugster vs. City of New Orleans, 36 A. 725.

8. Judgment null on its face will not be budgeted under mandamus.

State ex rel. Canal Company vs. City, 35 A. 72.

(B) *No fieri facias*: When:

1. No *fi. fa.* issues against State.

Carter vs. State, 43 A. 927.

2. Nor against a succession.

Levy & Sugar vs. Cowan & Mayo, 27 A. 556; Succession of Beckman, 16 A. 353.

(C) Duties of lower court touching execution of Supreme Court are purely ministerial.

Lovelace vs. Taylor, 6 R. 92; Cox' Executors vs. Thomas, 11 L. 866; Bank vs. Mayor, 35 A. 408; Holstein vs. Henderson, 6 N. S. 276.

(D) On what judgments execution can not issue:

Decree homologating proceedings of family meeting which authorized the adjudication of community property to surviving spouse.

Heirs of Biddell vs. Hayes, 21 A. 643.

(E) On what judgments execution may issue.

On revived, as well as on original, judgment.

Scherrer vs. Caneza, 33 A. 314.

618. Lower Court Executes—Therefore the court of appeal, whether it affirm or reverse the judgment, or whether it has rendered another definitive judgment in the cause, must send the same to the inferior court, in order that it may be executed.

C. P. 915; Lea vs. Terry, 15 A. 159.

Judgment may be enforced.

1. By registry of judgment, and enforcement of judicial mortgage resulting therefrom.

Adams & Co. vs. Coons, 37 A. 307.

2. Lower court executes.

State vs. Third District Court, 16 A. 233; Davidson vs. City, 32 A. 1245.

3. District court only acts ministerially in the execution of judgments rendered by Supreme Court and its execution subject to revision.

Cox' Executors vs. Thomas, 11 L. 866; 23 A. 392; Lovelace vs. Taylor, 6 R. 92; State ex rel. Jury vs. Livaudais, 39 A. 984; State ex rel. Bank vs. Mayor, 35 A. 409; Gee vs. Thompson, 37 A. 598; Holstein vs. Henderson, 6 N. S. 276; Succession of Triche, 34 A. 1143.

4. Lower court judges of execution when causes have arisen since rendition of judgment by Supreme Court.

Davidson vs. City, 32 A. 1245.

5. Court issuing execution controls it. But when execution goes to another parish, any competent court of that parish may enjoin it.

Simpson vs. Hope, 23 A. 557; see *Ante*, C. P. 608, (B) 2.

6. By what laws execution governed. Execution controlled by laws in force when execution was demanded.

Dean vs. Carnahan, 7 N. S. 259; Cooper vs. Hodge, 17 L. 476; Frey vs. Hebenstreit, 1 R. 565; Carnes vs. Red River, 29 A. 609; Scott vs. Duke, 8 A. 258; Bank vs. Markham, 8 A. 698.

7. Judgment debtor not opposing execution is estopped from denying that judgment is subject to execution.

Hayden vs. Slaughter, 48 A. 885.

But this does not apply where judgment debtor is not *sui juris*.

Stapleton vs. Butterfield, 84 A. 822; see C. P. 612, No. 1.

619. Recordation of Judgment in Lower Court—This judgment can not even be executed, until it has been recorded in the records of the inferior court which first had cognizance of the cause.

Amet vs. Boyer, 42 A. 833.

(A) When recordation not necessary:

Recording in lower court is unnecessary when judgment becomes on rendition instantaneously operative, as one declaring State officer ineligible and the office vacant.

State ex rel. Pugh vs. Judge, 88 A. 1881; see also Curtis' Case, 4 L. 35.

(B) No formal motion required to render judgment executory:

It was otherwise prior to Act 305 of 1852.

State ex rel. Pugh vs. Judge, 88 A. 1887; State ex rel. Bovee vs. Heron, 24 A. 623.

620. Mandate of Supreme Court—Recordation and Process on, in Lower Court—This recording shall be directed to be made by the party wishing to make use of the judgment, but without any obligation on his part to give previous notice to the opposite party; and the clerks of the district courts shall have the power to receive, file and record, all mandates and decrees rendered by the Supreme Court, and to issue all legal process thereon.

Penalty when lower judge and clerk obstruct execution of decrees of Supreme Court is contempt.

State ex rel. Bovee vs. Herron, 24 A. 623.

621. Beneficiary Under Judgment Controls Execution—

It is also the duty of the party wishing to avail himself of the judgment, to follow up the execution of it, according to the delays and forms hereafter provided.

(A) *Who may execute judgment or control execution:*

1. Only party to record controls execution, whether original party or assignee or subrogee.

State ex rel. Bank vs. Mayor et al., 35 A. 409; Florance vs. Bridge, 5 A. 785; Fluker vs. Turner, 5 N. S. 707.

2. Where plaintiff dies, his heirs may issue execution immediately.

Lengendre vs. McDonough, 6 N. S. 514.

3. But when defendant dies, judgment must be declared executory.

Id.

4. Divisible judgment may be executed at different times.

Bourguignon vs. Boudousquie, 7 N. S. 157.

5. Separate judgments can not be jointly executed.

Dugat vs. Babin, 8 N. S. 392.

6. Only one execution at one time, no matter how many defendants.

Hudson vs. Dangerfield, 2 L. 66; Blanchard vs. Zacharie, 15 L. 541.

7. Transferee of judgment may issue execution in the name of his transferrer.

13 A. 325.

8. Or in his own name.

8 A. 267; Town vs. Couch, 7 A. 94.

9. And where a creditor of suing plaintiff seizes the right of action, suit is thereafter prosecuted for his benefit and heirs bound by the judgment.

Bank vs. Miller, 45 A. 493.

10. Surety who pays judgment and is subrogated may issue execution.

Prigg vs. Beamen, 6 L. 63; Scott vs. Featherstone, 5 A. 313; Connelly vs. Bourg, 16 A. 109.

11. Transferrer of judgment may still control execution, his transferee not opposing.

Walker vs. Villavaso, 24 A. 45; 18 A. 524.

(B) *Who can not control:*

One not a party on the record and to whom no transfer is shown.

Fluker vs. Turner, 5 N. S. 707; Florance vs. Bridge, 5 A. 735; State ex rel. Bank vs. Mayor, 85 A. 411; Willie vs. Nicholson, 24 A. 548; 1 R. 94; 9 R. 77; 9 A. 174.

622. Execution in Unappealable Case Issues at Once—

If the judgment has been rendered where no appeal lies, or on confession of one of the parties, the party wishing to make use of it may prosecute the execution immediately after the close of the term, excepting in the first district.

The clause "*excepting in the first district,*" was inserted in this Article when the Code was adopted in 1824. The first district then comprised the parishes of Orleans, St. Bernard, Plaquemines, St. Charles and St. John the Baptist.

Martin's Dig., Vol. 2, p. 188.

623. Execution Follows Recordation in Lower Court—

If the judgment has been confirmed, or a new one rendered on the appeal, which pronounces definitely on the cause, the execution may be prayed for, as soon as the judgment has been recorded in the inferior court, to which the execution is remanded.

624. Execution in Appealable Cases—Respecting judgments subject to appeal, the party in whose favor one is rendered can only proceed to the execution after ten days, counting from the notification which he is obliged to make to the opposite party, if the latter has not appealed from the judgment within this interval, or if, having appealed, he has failed to furnish the security necessary to stop execution; provided, that whenever an answer has been filed in a suit, in which the defendant has had personal

service made upon him to appear and file his answer, or when a judgment has been rendered in a case after answer filed by the defendant, or by the counsel, the party cast in the suit shall be considered duly notified of the judgment, by the fact of its being signed by the judge; provided, that in the country parishes no execution shall issue in cases where an appeal lies, until ten days after the adjournment of the court by which the judgment was rendered, within which delay a party may take a suspensive appeal, on filing petition and appeal bond, as now provided by law.

C. P. 575.

(A) Execution of judgment subject to appeal:

See C. P. 575.

Where judgment capable of suspensive appeal, it is not executory until time (ten days) within which such appeal may be taken has elapsed.

State ex rel. Fugh vs. Judge, 33 A. 1387.

(B) Prematurity of execution:

1. Execution premature before proper notice of judgment is given when that is necessary.

Taylor vs. Woodward, 25 A. 213; Greene vs. Johnson, 21 A. 464; 6 R. 20; 8 L. 287; 19 A. 210; 20 A. 588; 15 A. 254.

2. Act 24 of 1876 provides that party cast shall be notified of judgment by fact of signing when it has been rendered in suit in which he had personal service, or when he has filed answer, etc.

See De Sentmanat vs. Soule, 33 A. 610.

(C) Appellant may abandon appeal and execute at any time.

Snider vs. Collins, 30 A. 1236; Savoie vs. Thibodaux, 29 A. 52.

(D) Effect of sale pending devolutive appeal:

Where sale is made on execution of judgment devolutively appealed from and which judgment is reversed, sale may be regular as to third persons.

Richardson vs. Smith, 26 A. 746; Frost vs. McLeod, 19 A. 68.

625. Application to Clerk for Execution—Execution Against Parishes—A party wishing for the execution of a judgment which has been rendered in his favor may ap-

ply for this purpose to the clerk of the court having cognizance of the case in the first instance, who shall deliver to him an order of execution, according to the particulars of the judgment which has been pronounced, as is declared hereafter; *provided*, that whenever a judgment for money is rendered by any court of competent jurisdiction against a parish of this State, the judge who shall render the judgment shall, in the same decree, order the assessor forthwith to assess a parish tax, at a sufficient rate *per centum*, upon the assessment roll of the current year, to pay and satisfy said judgment, with interest and cost; and whenever any judgment for money has heretofore been rendered, by any court of competent jurisdiction, against a parish, the judgment shall, on motion, order forthwith the assessor to assess the tax, as above provided; and in every such decree of judgment, the judge shall provide that immediately upon the assessment of the tax by the assessor of the parish, the parish tax collector shall proceed forthwith to collect said tax, in the same manner that parish taxes are now collected, and the proceeds shall constitute a special fund, out of which said judgment, interest and cost shall be paid, and shall not be diverted to any other purpose; *provided*, sufficient proof be furnished to the judge that there are no funds in the parish treasury to satisfy said judgment.

C. P. 641.

N. B. All of this article after the word "*provided*" is repealed by Act 56 of E. S. of 1877, p. 87.

626. Execution Must Be Sealed and Signed—Terms—

This order must be sealed with the seal of the court, and signed by the clerk, who shall direct it to the sheriff, with orders to execute it, according to its contents; or according to the directions of the judgment to which the writ may refer, and to make this return to the court of the manner in which he shall have executed the writ.

Seal of court is essential to validity of writ.

Bonin vs. Durand, 2 A. 776; *Fink vs. Lelande*, 16 L. 547; *Drouet vs. Rice*, 2 R. 874; *King vs. Baker*, 7 A. 570.

627. Endorsement of Sheriff—In this case and in all others where the sheriff is charged with the execution of an order of the court, he must, on receiving it, endorse on it the day of the week, month and year, on which it is delivered to him.

628. Terms and Nature of Orders of Execution—Orders of execution are different, according to the nature of the judgments to be executed; for these judgments may direct that a thing shall be given, or a thing be done or omitted, or a sum of money be paid, and this variety subjects the execution to different rules, which are explained in the two following sections.

629. Court Rendering Judgment Takes Cognizance of Execution—It is for the court, whether appellate, or inferior, which has rendered the judgment, to take cognizance of the manner of its execution, when the proper manner of executing it is to be determined.

C. P. 617.

1. Supreme Court takes cognizance of its own judgments and decrees.

Minor vs. Stone, 1 A. 268; *Carroll vs. Chaffe*, 85 A. 88; *Lambeth vs. Sentell*, 88 A. 688.

2. District Court incompetent to enforce execution of judgment of justice of peace, and prohibition lies to prevent it. *State ex rel. Police Jury vs. Judge*, 89 A. 284.

3. Courts of first instance execute judgments and Supreme Court will not interfere except in clear cases of injustice.

Compton vs. Aïreal, 9 A. 498; *Donnell vs. Parrott*, 18 A. 258; 7 N. S. 688; 8 M. 68; *Dufossat vs. Berens*, 19 A. 889.

4. District Court could not restrain by injunction execution from parish court.

McGinty vs. Richmond, 27 A. 606; *Bonin vs. Monot*, 28 A. 597.

5. Cases often arise where different court must act *ex necessitate rei* to arrest great and impending injury.

Laws vs. Chinn, 4 N. S. 390; *Donnell vs. Parrott*, 13 A. 253; *Dufosse vs. Berens*, 18 A. 339; *Copley vs. Edwards*, 5 A. 644; *Hobgood vs. Brown*, 2 A. 523; *Police Jury vs. Michel*, 4 A. 84; *Coleman vs. Brown*, 16 A. 110; *State ex rel. Osborn vs. Judge*, 35 A. 539; *Giffen, Smedes & Co. vs. Manning*, 10 A. 204, 206; *Arenstein vs. Weber*, 21 A. 199; *Simpson vs. Hope*, 23 A. 537; *Sheriff vs. Judge*, 46 A. 81.

6. But defendant in execution can not invoke aid of any other court than that rendering and executing the judgment.

Arthurs vs. Sheriff, 43 A. 417.

7. Court which renders judgment executes it.

Gee vs. Thompson, 37 A. 598; *Stafford vs. Renshaw*, 33 A. 443; *State ex rel. Police Jury vs. Judge*, 39 A. 984.

8. Where mode of execution is part of decree of Supreme Court, lower court can not question its legality.

Stafford vs. Renshaw, 33 A. 443.

SECTION II.

Of the Execution of Judgments, Which Require Something to be Given or Something to be Done.

630. Writ of Possession—When the judgment directs one of the parties to deliver an estate to the other, the clerk must issue a writ of possession, by which the sheriff shall be enjoined to put him, in whose favor the judgment was rendered, in possession of the estate and the appurtenances belonging to it, according to the judgment.

C. P. 1058.

Decree itself need not direct issuance of writ.

State ex rel. Levy vs. Clerk, 15 A. 573.

631. Judgment and Sometimes Petition Accompany Writ—This writ of possession shall be directed to the sheriff, with a copy of the judgment, and even of the petition to which it refers, if the party require it, to the end that the sheriff may not be mistaken concerning the nature of

the estate and appurtenances of which he is to give the possession.

1. Execution follows judgment and judgment is construed by the pleadings.

See *ante* "Judgment;" Williams vs. Kelso, 7 L. 409; Melancon vs. Duhamel, 8 N. S. 7; Levy vs. Bondy, 15 A. 578; Copley vs. Bonner, 7 A. 579.

2. But pleadings will not control unambiguous judgment.

Avery vs. Police Jury, 75 A. 228; 14 L. 446.

632. Execution of Writ of Possession—If three days after the sheriff shall have served a copy of this writ on the party who has been condemned to quit the estate, he shall refuse to obey the order and to go off, the sheriff shall proceed to put in full possession of the estate the party who has obtained the judgment, and shall compel the other to depart, even by breaking open the doors, if it be necessary, and by summoning the *posse comitatus*, if resistance be made.

C. P. 762.

633. Compliance With Writ—The party, against whom the judgment has been rendered, shall be considered to have complied with it, by quitting the estate, and leaving the other party free to take possession.

634. Delivery of Specific Thing—If the judgment should order the delivery of a specific object, the writ shall direct the sheriff, on failure of the debtor to deliver to him the specific object, after three days' service of a copy of the writ, to seize the object wherever it may be found, and deliver it to the party in whose favor the judgment was rendered.

635. Damages or Sequestration of Other Property to Enforce Writ of Possession—If the party, who has been condemned to deliver an object, conceals it, or carries it out of the jurisdiction of the court, so that the sheriff can

not seize it, the party in whose favor the judgment was rendered, shall have the choice either of instituting an action for damages, or of compelling a specific execution of the judgment, by obtaining a sequestration of his other property, until he has satisfied it, in the same manner as is practised on judgments directing a specific performance, as is stated below.

Remedies indicated above exclude power of court to punish for contempt.

State ex rel. Hero vs. Judge, 86 A. 354.

636. Writ of Distringas—When the judgment orders, not the delivering, but the doing or refraining from something specified in it, if the party condemned, on demand made by the sheriff that he shall comply with it, refuses or neglects to do so, and this refusal or neglect appears by a certificate of the sheriff, the party in whose favor the judgment was rendered may obtain, on motion, an order to distrain all the property movable and immovable of the party who is in default, until he shall have fully satisfied the judgment.

C. P. 1058.

1. Process by distringas is given to enforce judgments and decrees in ordinary judicial proceedings, but where remedy is by mandamus, refractory defendant may be punished for contempt.

State ex rel. Bauman vs. Judge, 88 A. 48; Board of Commissioners of Leavenworth vs. Sellen, 99 U. S. 623.

2. Distringas not proper mode of executing judgment ordering that a certain dam be closed.

Avery vs. Police Jury, 15 A. 228.

637. Execution of Writ of Distringas—It is the duty of the sheriff, charged with the execution of this order of distringas, to seize without delay, the movable and im-

movable property of the party in default, and to receive the rents, income, and other profits, and to keep the whole subject to the order of the court, until the order shall be revoked.

1. Rents of property dedicated to a parish for public use are, like property itself, exempt from seizure.

Kline vs. Parish of Ascension, 33 A. 565.

2. Property dedicated to public use is not in commerce and not subject to seizure.

Burke vs. Wall, 29 A. 88; *City of Baton Rouge vs. Bird*, 21 A. 244.

638. Collections Under Distringas May Be Ordered Paid to Creditor—Nevertheless, the court may, from time to time, when the nature of the case requires it, order that the sums arising from the income thus collected shall be paid to the party in whose favor the judgment was rendered, if he demands it, and gives good and sufficient security to refund the sums thus paid to him, when the judgment of the court shall have been complied with, and he shall have been paid the expenses and damages which may be allowed to him, as provided in the following article.

639. Quashing Distringas—The judge may quash the order of distringas, if it be proved to him that the party condemned has fully satisfied the judgment, and has paid all the damages which he has the power of granting to the other party.

640. Return of Sheriff—As soon as the sheriff shall have executed the writs of possession and order of distringas which were directed to him, he must return into the court which issued them the originals of these writs, with his return indorsed, stating the manner in which they have been executed, and the particulars of the property distrained, in case the order of distringas was issued.

SECTION III.

Of the Execution of Judgments Directing the Payment of a Sum of Money.

§ I.

Of the Writ of Fieri Facias.

641. Writ of Fieri Facias—When the judgment orders the payment of a sum of money, the party in whose favor it is rendered may apply to the clerk and obtain from him a writ of *feri facias* against the property of his debtor.

C. P. 625.

Writ of fieri facias.

1. Nothing prevents several *fi. fas.* from issuing against same property.

Gusman vs. DePoret, 22 A. 523.

2. *On what judgments fieri facias can not issue:*

- (a) Decree homologating deliberations of family meeting which authorized adjudication of community property to surviving parent.

Heirs of Biddell vs. Hayes, 21 A. 642.

- (b) Decree ordering or perpetuating a mandamus.

State ex rel. Board of Police vs. Judge, 21 A. 741.

- (c) Mere separation of property between spouses, uncoupled with judgment for money.

Hardie vs. Turner, Wilson & Co., 31 A. 469; Compton vs. Maxwell, 23 A. 636.

- (d) Mere consent twelve months' bond.

Strother vs. Richardson, 30 A. 1270.

3. *On what judgments fieri facias can issue:*

Judgment homologating account between tutor and ward and fixing a balance.

Tanneret vs. Edwards, 18 A. 606; Capdeville vs. Erwin, 13 A. 285.

4. No *fi. fa.* against city of New Orleans.

Act 5 of E. S. 1870.

5. *Nor* against a succession.

Morgan vs. Lalanne, 32 A. 1800.

6. *Fieri facias* against debtors *in solido*. Option lies with creditor as to which debtor to seize.

Michel vs. Benner, 24 A. 287; Casson vs. Cureton, 12 M. 486; Blanchard vs. Zacharie, 15 L. 641.

7. Reduction of excessive seizures. That seizure is excessive is no ground for injunction, but for application for reduction.

C. P. 652; Lambeth vs. Sentell, 33 A. 694.

642. Garnishment—Reduction of Seizure—Return of Writ in Thirty to Seventy Days—Proceedings Under Copy of Original Writ—This writ is directed to the sheriff of the parish where the property of the debtor is situated, and orders him to seize the property real and personal, rights and credits of the debtor, and to sell them to satisfy the judgment obtained against him; and all writs of *fieri facias*, issued by the clerks of the several courts throughout the State, shall be made returnable by them in not less than thirty nor more seventy days.

Garnishment—And whenever a party plaintiff in a cause has applied for a writ of *fieri facias* against the defendant, and has reason to believe that a third person has property or effects in his possession, or under his control, belonging to the defendant, or is indebted to him, he may cause such third person to be cited to answer, under oath, such interrogatories as may be propounded to him touching said property and effects, or such indebtedness, in the same manner and with the same regulations as are provided in relation to garnishees in cases of attachment, and pursuant to special laws.

Several Writs—It shall be lawful for any judgment creditor, entitled to execution, to issue several writs of *fieri facias* to different parishes at the same time;

Reduction of Seizure—Provided, that when the property of any defendant in execution shall be under seizure, in different parishes, at the same time, such defendant shall have the right to have a reduction of the seizures which shall have been so made, upon showing that the amount of property so seized is more than sufficient to satisfy his creditors' judgment;

Liability for Damages—And provided, also, that such seizing creditors shall be liable to pay the defendant in execution such damages as the latter may have sustained in consequence of any excessive seizures made at his instance.

Return of Writ—Retention of Copy—And in all cases, except in the parish of Orleans, where a seizure of property shall have been made under a writ of *feri facias*, and the officer making such seizure shall not be able to sell such property before the return day of the writ, such officer shall, nevertheless, make due return of such writ; but, at the time of making such return, he shall make and retain a copy of the writ, duly certified by himself; and it shall be his duty to proceed under such certified copy, in the same manner as though the original writ was in his hands, and to make due return thereon;

Copy by Clerk—And in the parish of Orleans, the officer, at the time of making return as aforesaid, shall cause to be made by the clerk of the court, issuing said writ, a duly certified copy thereof; and it shall be the duty of such clerk to deliver said duly certified copy to said officer within twenty-four hours from the time of filing such original writ and return thereon; and the officer shall proceed, under such certified copy so furnished him, in the same manner as though the original writ was in his hands, and to make due return thereon.

C. P. 246, 262, 268, 648, 700, 746.

(A) Requisites of valid seizure:

Where from nature of the case it is possible, actual, physical possession of thing seized by sheriff is necessary.

Gordon vs. Giffoll, 27 A. 265; Corse vs. Stafford, 24 A. 263; Kilbourne vs. Frellsen, 22 A. 209; Crane, Breed & Co. vs. Constable, 28 A. 512; Mille vs. Hebert, 19 A. 68; Williams vs. Clark, 11 A. 761; Gaines vs. Merchants' Bank, 4 A. 869; Lockhart vs. Harrell, 6 A. 581; Stockton vs. Downey, 6 A. 585; Galbraith vs. Synder, 2 A. 492; Offat vs. Monquitt, 2 A. 785; Taylor vs. Stone, 2 A. 910; Derille vs. Hayes, 23 A. 550; Fluker vs. Ballard, 2 A. 838; Simpson vs. Allain, 7 R. 504; Gallagher vs. Abadie, 26 A. 343.

(B) Actual physical possession not necessary:

1. In seizures of real estate in New Orleans; mere registry is sufficient.

R. S. 8625; Coste vs. Handy, 34 A. 862; Elder vs. Olty, 31 A. 505; Morere vs. Preston, 34 A. 874; 28 A. 578; 20 A. 578.

2. In all cases where property is under lease; mere notice is sufficient.

C. P. 657; Pipkin vs. Sheriff, 36 A. 782; Decoux vs. Bank, 2 A. 457.

3. The fact that seized debtor remains on property does not invalidate seizure.

Paul vs. Hoss, 28 A. 852.

(C) Conflict of seizures:

First seizure prevails, and stay of execution thereof stays other executions.

Denton vs. Woods, 19 A. 856.

(D) Alias writs of *f. fa.*:

1. Will not issue:

- (a) When injunction restrains proceedings under the original.

Byrne, Vance & Co. vs. Mithoff, 24 A. 297.

- (b) When not necessary, as for instance, in tax executions where original writ does not expire.

Marin vs. Sheriff, 30 A. 296.

2. Will issue:

- (a) When original is returned unsatisfied.

Harper vs. Terry, 16 A. 217.

- (b) New seizure must be made under alias *f. fa.*

Black vs. Catlett, 1 R. 540; 2 L. 280.

(E) Arresting writ of *fieri facias* :

Original writ can be restrained only by injunction; not by a rule to quash.

2 R. 90; Wiley vs. Woodman & Bement, 16 A. 210; Levi vs. Converse, 20 A. 558; 19 A. 189.

(F) No valid seizure is made:

1. Where sheriff merely gives notice, and possession is taken by his successor.

Simpson vs. Allain, 7 R. 501.

2. Where sheriff seizes proceeds of thing about to be sold; thing itself should be seized.

Goubeau vs. R. R. Co., 6 R. 346.

(G) To what sheriff writ directed:

To sheriff of parish where property is located.

Levy, Loeb & Co. vs. Acklen, 87 A. 545.

(H) Garnishment process when ancillary to *fi. fa.*:

1. See chapter on attachment for complete discussion of garnishment.

Ante Art. 246 *et seq.*

2. Incorporeal rights may be seized by mere notice to debtor, and this mode of seizure does not exclude, nor is excluded by, garnishment process under attachment.

Levy, Loeb & Co. vs. Acklen, 87 A. 545; McDonald vs. Insurance Company, 32 A. 596; Stockton vs. Downey, 6 A. 535; Stafford vs. Maxwell, 23 A. 847; Rightor vs. Sildell, 9 A. 606; Hanna vs. Bry, 5 A. 656; Nugent vs. McCaffery, 33 A. 274.

3. Where no valid writ is issued, garnishment thereunder fails.

Matta vs. Thomas, 21 A. 87; Mathews vs. Insurance Company, 26 A. 586; Roliteau vs. Falton, 11 R. 221; Copwell vs. Fretnell, 2 A. 319; Simpson vs. Allum, 7 R. 506.

(I) What court issues garnishment:

Court issuing writ issues garnishment in cases of *attachment*, but not in cases of *garnishment under fi. fa.* Court of domicile of garnishee must issue.

Marqueze vs. LeBlanc, 29 A. 194; Alter vs. Pickett, 24 A. 516; Roohereau vs. Guidry, 24 A. 311; Landry vs. Dickson, 8 L. 127; Favrot vs. Delle Plane, 7 A. 239; Featherstone vs. Compton, 8 A. 380; 4 A. 585; Kahn & Biggart vs. Sippill, 35 A. 1040.

(J) Return of writ of *fi. fa.*:

Writ must be returned before return day. Originally such return was not necessary except when directed by execution creditor.

Rowley vs. Kemp, 2 A. 360; Dorsey vs. Bank, 5 A. 237.

(K) Copy of writ:

1. In the country, the sheriff makes the copy duly certified by himself, but in parish of Orleans clerk makes out duly certified copy.

Billgery vs. Ferguson, 30 A. 87; Briant vs. Hebert, 30 A. 1129; 16 A. 177.

2. After expiration of writ and without copy, sheriff's power to act is at an end.

Billgery vs. Ferguson, 80 A. 84.

(L) No return necessary—when:

In writs of *fi. fa.* to collect taxes.

Bellocoq vs. New Orleans, 81 A. 471; *Elder vs. New Orleans*, 81 A. 500.

(M) Making of seizure and giving of notice must precede expiration of writ:

1. Return may be made after expiration.

Briant vs. Hebert, 80 A. 1128; *Byrne vs. Taylor*, 2 R. 341.

2. And sale may be made after expiration, sheriff retaining copy.

Labiche vs. Lewis, 12 R. 18.

3. But where copy is not retained, seizure is released.

Black vs. Catlett, 1 R. 540.

(N) Effect of return of writ:

It does not release garnishment or seizure.

Egana, Lea & Dupasseur vs. Bringler, 24 A. 164; R. S. Sec. 3416; *Stackhouse vs. Zuntz*, 41 A. 419.

But when writ returned unsatisfied, seizure is abandoned and released.

Roman vs. Denny, 19 A. 521; *Black vs. Catlett*, 1 R. 540.

643. What Property May Be Seized—As soon as the sheriff has received this writ, he must execute it without delay, by seizing the property of the debtor which he shall find in his parish, except such things as are mentioned in the following article.

C. P. 642.

(A) What property may be seized:

1. Resulting interest of heir in succession may be seized.

Boisse vs. Dickson, 81 A. 741; *Heirs of B y vs. Noble*, 87 A. 667; *Morgan vs. Lalanne*, 82 A. 1800; 80 A. 1067.

2. Valid seizure of interest of heir should show:

(a) Complete list of assets and liabilities of the estate.

Id.; *Gales vs. Christy*, 4 A. 295.

(b) Appraisement of such interest as a single undivided thing, deducting debts and charges.

Hickman vs. Freret, 80 A. 1067; *Nobles vs. Nettles*, 3 R. 152; *Mayo vs. Stroud*, 12 R. 105; *Diamond vs. Courtney*, 12 A. 251.

3. Right of action, as well as judgment, may be seized.
Jack vs. Harrison, 84 A. 736; *Stafford vs. Maxwell*, 28 A. 847; *Nugent vs. McCaffery*, 33 A. 274.
4. But not right to an injunction.
Nugent vs. McCaffery, 33 A. 274.
5. Nature of right seized should be specifically stated.
Gales vs. Christy, 4 A. 298; *McDonogh vs. Gravier's Curator*, 9 L. 542; *Pickergill vs. Brown*, 7 A. 304.
6. Dotal property after dissolution of marriage.
Bonvillain vs. Bourg, 16 A. 366; *Querlin vs. Rivarde*, 8 R. 457.
7. Interest of debtor in stock of goods may be seized.
Fleytas vs. Poutz, 16 A. 414.
8. Promissory note or draft may be seized:
 - (a) Requisites of seizure: Actual physical possession by sheriff when note is negotiable and has not matured.
Miller vs. Streedier, 18 A. 56; *Scott vs. Neblett*, 6 A. 183; *Harris vs. Bank*, 5 A. 539; *Anderson vs. Valentine*, 15 A. 390; *Rightor vs. Phelps*, 16 A. 106; *Gaines vs. Bank*, 4 A. 369; *Fluker vs. Bullard*, 2 A. 538; *Galbraith vs. Snyder*, 2 A. 492; *Taylor vs. Stone*, 2 A. 324.
 - (b) If in possession of clerk of court, he may be ordered to surrender it.
Estate of Mille vs. Hebert, 19 A. 58; *Stansbury vs. McCall*, 8 A. 9; *Price vs. Emerson*, 7 A. 257; *Woodworth vs. Lemmerman*, 9 A. 524.
 - (c) But by attachment and garnishment, seizure may be made in hands of clerk; copy of note may be taken.
Scott vs. Neblett, 6 A. 182; *Edler vs. McAllister*, 14 A. 521; *Mille vs. Hebert*, 19 A. 59.
 - (d) Seizure of twelve months' bond not valid where no actual possession is taken by sheriff.
Lockhart vs. Harrell, 6 A. 581.
9. Pledged property may be seized and sold subject to pledgee's privilege. Pledgee can not enjoin sale.
Hornor vs. Denis, 34 A. 389; *Williams vs. Schooner*, 1 N. S. 417; *Auge vs. Varlot*, 31 A. 865; *Pickens vs. Webster*, 31 A. 870; *Bourg vs. Lopez*, 36 A. 440; *Case vs. Kloppenburg*, 27 A. 483; *Arick vs. Walsh & Boisseau*, 23 A. 605; *Friedlander vs. Schmalinski*, 35 A. 520.
10. Movables on leased premises may be seized and sold at instance of lessee's creditors but subject to lien of lessor.
Pickens vs. Webster, 31 A. 870; *Tanner vs. Tanner*, 6 R. 25; *Robb vs. Wagener*, 5 A. 112; *Arick vs. Walsh & Boisseau*, 23 A. 605; *Case vs. Kloppenburg*, 27 A. 483.
11. And so growing crop of lessee may be seized and sold.
Citizens' Bank vs. Wiltz, 31 A. 245; *Pickens vs. Webster*, 31 A. 870.

12. Any partnership property may be seized and sold to satisfy a partnership debt, none being exempt.

White & Barrett vs. Heffner, 30 A. 1280.

13. Resulting interest of a partner may be seized and sold, but no particular piece of property can be seized.

Marston vs. Dewbery, 21 A. 518; Levy & Sugar vs. Cowan & Mayo, 27 A. 556; Degelos, Durrie & Co. vs. Woolfolk, 21 A. 706; Bank vs. McKeage, 11 R. 180; Ursuline Nuus vs. Connolly, 22 A. 51.

- (a) And seizure does not dissolve partnership or authorize appointment of receiver.

Choppin vs. Wilson, 27 A. 444.

- (b) But one partner may sequester partnership property to prevent devastation and irreparable injury.

State ex rel. Roth vs. Judge, 38 A. 49.

14. Debtor's action of warranty may be seized.

Lynch vs. Kitchen, 2 A. 843.

15. Rights of lessee under a lease may be seized.

Brinton vs. Datas, 17 A. 174; D'Aquin vs. Armant, 14 A. 217; Bartels vs. Creditors, 11 A. 452.

But purchaser of lease not buying mere right of occupancy must pay for remainder of term.

Lehman & Co. vs. Dreyfus, 37 A. 598; Bartels vs. Creditors, 11 A. 452.

16. Money of debtor deposited with third person to abide result of horse race, and seizure will be maintained even after debtor has lost, if the bet be excessive.

St. Ceran vs. Sherman, 19 A. 192.

17. Property of debtor, though same be held under a release bond in attachment suit of another creditor.

Hoy & Co. vs. Eaton & Barstow, 26 A. 169.

Or when held in trust by third person as bailee or trustee.

Bourg vs. Lopez, 36 A. 439.

18. Waterworks bonds held by city of New Orleans.

City vs. Insurance Company, 23 A. 61.

But *aliter* at present since Act 33 of 1877.

105 U. S. 608; State ex rel. Board vs. City, 36 A. 524.

19. All improvements, tools, instruments, in a large foundry or machine shop; such articles not being exempt.

Boston Belting Company vs. Ivens, 28 A. 695.

20. Certificates of stock, even without formal transfer on books or notice to corporation.

Smith vs. Slaughterhouse Company, 80 A. 1878.

But sheriff must take actual possession of certificate.

81 A. 151, 525.

21. All property of debtor held by third person by fraudulent or simulated title, and seizing creditor may allege and prove fraud or simulation in answer to injunction.

Act 46 of 1886.

Under prior jurisprudence, direct seizure was permissible only in cases of pure simulation.

Vickers vs. Block, Britton & Co., 81 A. 672; Gauthreaux vs. Thibodaux, 86 A. 179; Willis vs. Scott, 83 A. 1026; Carter vs. Farrell, 39 A. 103; McAdam vs. Soria, 81 A. 865; Austin vs. DaRocha, 24 A. 46; Gleises vs. McHatton, 14 A. 560; Scully vs. Kearns, 14 A. 435; Simpson vs. Mills, 12 A. 178; Dosson vs. Bieller, 10 A. 570; McMasters vs. Place, 8 A. 481; Emswiller vs. Burham, 6 A. 729; Maxwell vs. Mallard, 5 A. 702; Hughes vs. Winfry, 5 A. 663; Erwin vs. Bank, 5 A. 1; Dawson vs. Holbert, 4 A. 56; Oglesby vs. Drake, 3 A. 640; Clark vs. Bank, 3 A. 326; Hobgood vs. Brown, 2 A. 323; Lindeman vs. Theobalds, 2 A. 913; Jonan vs. Drex, 1 A. 364.

22. Right of redemption of property may be seized.

Lacroix vs. Camors, 84 A. 639.

23. Private property, though employed in government service carrying the mails, if not otherwise exempt.

Parker vs. Porter, 6 L. 169.

(B) Seizure of movables or rights sold but undelivered is valid:

1. Of movables before delivery.

Dunbar vs. Dinkgrave, 10 A. 545; D'Armond vs. Sheriff, 21 A. 198.

- (a) And creditor of vendee may seize after delivery.

Terrill vs. Hays, 24 A. 428.

- (b) But creditor of proposed purchaser can not seize until title passed to debtor.

Broadwell vs. Raines, 34 A. 678.

2. Of incorporeal rights before notice of sale to debtor.

St. Rome vs. Otton Press, 21 A. 291; Eelf & Co. vs. Boro, 17 A. 288; Drumm vs. Sherman, 20 A. 96.

(C) What will constitute delivery:

1. Mere order to deliver.

Aguader vs. Quish, 21 A. 822.

2. Mere service of notice of transfer of credit upon attorney of debtor.

Morrison vs. Lynch, 36 A. 611; *Golsan & Co. vs. Powel*, 32 A. 521.

3. Mere subrogation in court, without other notice to debtor.

Drumm vs. Sherman, 20 A. 96.

644. Exemptions From Seizure—The sheriff can not seize the linen and clothes belonging to the debtor or his wife, nor his bed, nor those of his family, nor his arms and military accoutrements, nor the tools and instruments necessary for the exercise of the trade or profession by which he gains a living; nor shall he, in any case, seize the rights of personal servitude, of use and habitation, of usufruct to the estate of a minor child, or the income of dotal property.

C. P. 287, 647, 1140.

(A) Exemptions from seizure:

Civil Code, Article 1992: "There are also rights which are merely personal, that can not be made liable to the payment of debts, etc.; these are the rights of personal servitude, of use and habitation, of usufruct of the estate of a minor child, of the income of dotal property, to money due for the salary of an office, or wages or recompense for personal services."

Act 1852.

(B) Seizure by lessor of musical instruments hired by sub-lessees:

By Act 68 of 1874, no landlord, lessee or owner of any tenement house, or houses, or any agent of such landlord, lessee or owner, can seize or cause to be seized, for rent due by the sub-lessee or inmates of such house or houses, any piano, organ or other musical instrument in said house or houses which is hired for use from any company or individual, and is not the personal property of the inmates or sub-lessees aforesaid.

(C) Waiver of exemption forbidden:

Act 79 of 1876 and 17 of 1874 forbid any waiver of rights of exemption conferred, and by section 2 enact that whoever shall, by artifice or subterfuge, induce or procure another to sign away by contract or otherwise their rights thereunder shall be deemed guilty of misdemeanor.

(D) Art. 644 amended and re-enacted:

Act 79 of 1876 amends and re-enacts to read thus: "The sheriff or constable can not seize the linen and clothes belonging to the debtor or his wife, nor his bed, bedding or bedstead, nor those of his family, nor his arms and military accoutrements, nor the tools and instruments, and books and sewing machines necessary for the exercise of his or her calling, trade or profession by which he or she makes a living, nor shall he in any case seize the rights of personal servitude, of use and habitation, of usufruct to the estate of a minor child, nor the income of dotal property, nor money due for the salary of an officer, nor laborer's wages, nor the cooking stove and utensils of the said stove, nor the plates, dishes, knives and forks and spoons, nor the dining table and dining chairs, nor wash tubs, nor smoothing irons and ironing furnaces, nor family portraits belonging to the debtor, nor the musical instruments played on or practised on by any member of the family."

(E) Pianos and sewing machines:

By Act 62 of 1877 sewing machines and pianos are liable to seizure to enforce the vendor's privilege. Whenever any movable property exempt from general seizure under the general laws shall have been transferred upon a condition that said transfer shall be considered a contract of lease until certain instalments are paid, the transferee to become then the owner, said contract shall be considered contract of sale, and the remedy of the party transferring shall be to enforce the vendor's privilege against the transferee for the unpaid balance of the price; provided, that nothing in the act shall be construed to give the right to exercise the vendor's privilege against movable property exempt from seizure where such right does not now exist, except in the cases of transfers of pianos and sewing machines.

(F) Exemptions as against lessors:

No exemptions save those mentioned in R. S. Sec. 2888 and C. C. 2705 are applicable to lessors.
Stewart vs. Lacoume, 30 A. 159.

(G) Strict construction of exemptions:

Exemptions strictly construed and not extended by implication.
Guillory vs. Deville, 21 A. 636.

(II) What property exempt from seizure:**1. Property dedicated to public use is exempt from seizure:****c. g.:****(a) Rents of public property.***Klein vs. Ascension*, 88 A. 536.**(b) Public lands—such as squares belonging to city.***Baton Rouge vs. Bird*, 21 A. 244; *Pickett vs. Brown*, 18 A. 562.

Even where by territorial changes such lands are not publicly used.

Police Jury vs. McCormack, 52 A. 624.**(c) Tombs and places of sepulture.***Burke vs. Wall*, 29 A. 88, 49.**(d) Court house and jail, or land on which they are located.***Police Jury vs. Foulhouse*, 80 A. 65; *Police Jury vs. Michel*, 4 A. 84; *Municipality vs. Egerton*, 1 A. 435.

But this does not apply to builder or mechanic.

McKnight vs. Grant Parish, 80 A. 861.**(e) Public streets.***Dublin vs. Mayor*, 1 M. 187; *Sheen vs. Stothart*, 29 A. 631.**(f) Property of Charity Hospital.***State vs. Finlay & Co.*, 83 A. 118.**(g) Public school property.***R. S. 8422.***(h) Public cemeteries and monuments.***R. S. 8423.***(i) Taxes.**

City vs. Davidson, 80 A. 541; *Wood vs. Board*, 40 A. 406; *R. E. Co. vs. Municipality*, 7 A. 148; *Municipality vs. Hart*, 6 A. 570; 105 U. S. 608; 2 *Woods*, 100; *Egerton vs. Municipality*, 1 A. 435; *Droz vs. East Baton Rouge*, 86 A. 840; *City vs. Gregg & Ford*, 28 A. 836.

(j) Public seminary of learning.2 *Woods*, 71.**2. Printing press and material for printing are exempt when owned by a single printer.***Prather vs. Bobo*, 15 A. 524.

But not when owned by a partnership.

White & Barrett vs. Heffner, 80 A. 1280.**3. Usufruct to estate of a minor child exempt.***Succession of Coyle*, 82 A. 79.

But any other usufruct not exempt.

Davis vs. Carroll, 11 A. 706.

4. Salary of public officer exempt—*e. g.*:
 - (a) City assessor.
Chaudet vs. DeJong, 16 A. 333.
 - (b) Sheriff.
Dunbar vs. Dinkgrave, 10 A. 546.
 - (c) State officer.
Willd vs. Ferguson, 23 A. 752.
 - (d) But office must be public, political office. Salary of liquidating commissioners of bank is subject to seizure.
Conrey vs. Copland, 4 A. 307; Vance vs. Lafferandrie, 4 R. 342.
5. Right granted by State to exact toll for use of canal exempt from seizure.
Case vs. Taylor, 23 A. 497.
6. Merchant's books and counting house furniture exempt.
Lambeth vs. Milton, 2 R. 81; Farmers' Bank vs. Franklin, 1 A. 226; Harrison & Co. vs. Mitchell & Co., 13 A. 330; Prather vs. Bobo, 5 A. 524.
7. Professional man's books and necessary apparatus exempt, but doctor's horse may be seized.
Hanna vs. Bry, 5 A. 655.
8. Instruments and sign of dentist exempt, and seizure will be released though landlord appear by third opposition.
Duperron vs. Communy, 6 A. 679.
9. Waterworks Company's bonds or stock held by the city of New Orleans.
State ex rel. Board vs. City, 36 A. 524; Morris vs. New Orleans, 135 U. S., 600.
Aliter prior to Act 33 of 1877.
City vs. Ins. Co., 23 A. 61.

(I) Seizure ineffective:

1. When property seized is held by debtor in trust.
Halpin vs. Barringer, 26 A. 171.
2. When property seized has been sold and delivered, even where purchaser is incompetent to buy.
Edwards vs. Fairbanks, 27 A. 451.
3. When property seized is already in sheriff's possession by virtue of a previous seizure, so as to divest first seizing creditor.
Henry vs. Tricou, 36 A. 522.
4. Where property is in hands of curator.
Collier vs. Stanbrough, 6 R. 234; Kennard vs. Stanbrough, 9 R. 235.

5. Where property is in hands of a syndic.

Schroeder's Syndics vs. Nicholson, 2 L. 350; Dupuy vs. Bemis, 2 A. 518;
Hayden vs. Yale & Bowling, 45 A. 366.

6. Where property is in hands of receiver.

Bell vs. E. R. Co., 34 A. 735.

(J) Waiver of exemption.

Exemption is waived where insolvent places upon schedule property otherwise exempt from seizure.

Bier vs. Creditors, 15 A. 167.

645. Agricultural Exemptions—Implements and Cattle not Seizable Separately from Land to which Attached—Nor can he seize the agricultural implements, and working cattle, separately from the land to which they are attached; nor the corn, fodder, hay, provisions, and other supplies necessary for carrying on the plantation to which they are attached, for the current year.

Homesteads—And in addition to the property and effects exempted as aforesaid, there shall also be exempted from seizure and sale, under execution, one hundred and sixty acres of ground, and the buildings and improvements thereon occupied as a residence, and *bona fide* owned by the debtor, having a family or mother or father, or person or persons dependent on him for support; also, one work horse, one wagon or cart, one yoke of oxen, two cows and calves, twenty-five head of hogs or one thousand pounds of bacon, or equivalent in pork; and, if a farmer, the necessary quantity of corn and fodder for the current year; provided, that the property herein declared to be exempt from seizure and sale does not exceed in value two thousand dollars, and in case of excess any sale thereof under execution shall be taken from the lot of ground and buildings herein mentioned, and not from the other property herein mentioned as being exempt from seizure and sale; and provided further, that no debtor shall be entitled to the exemption provided for in this section, whose wife shall own, in her own right and be in the actual enjoyment

of, property worth more than one thousand dollars; and provided further, that no property shall be exempt from sale, by virtue of this provision, for non-payment of taxes or assessments levied pursuant to law, nor for debt contracted for the purchase price of said exempted property, nor for money due for rents, bearing a privilege on said property under existing laws.

C. P. 1140.

(A) Homesteads:

Constitution, Art. 219. "There shall be exempt from seizure and sale by any process whatsoever, except as herein provided, the 'homestead' *bona fide* owned by the debtor and occupied by him, consisting of lands, buildings and appurtenances, whether rural or urban, of every head of a family, or person having a mother or father, a person or persons dependent on him or her for support; also, one work horse, one wagon or cart, one yoke of oxen, two cows and calves, twenty-five head of hogs, or one thousand pounds of bacon or its equivalent in pork, whether these exempted objects be attached to a homestead or not; and on a farm, the necessary quantity of corn and fodder for the current year, and necessary farming implements to the value of two thousand dollars; provided, that in case the homestead exceeds two thousand dollars in value the beneficiary shall be entitled to that amount in case a sale of the homestead under any legal process realizes more than that sum. No husband shall have the benefit of a homestead whose wife owns and is in the actual enjoyment of property or means to the amount of two thousand dollars. Such exemptions to be valid shall be set apart and registered as shall be provided by law. The benefit of this provision may be claimed by the surviving spouse or minor child or children of a deceased beneficiary if in indigent circumstances."

(B) Strict construction:

Homestead laws strictly construed. Every condition must be fulfilled.

Briant vs. Lyons, 29 A. 64; *Decuir vs. Benker*, 83 A. 330; *Thomas vs. Gullbeau*, 85 A. 927; *Crilly vs. Sheriff*, 25 A. 219; *Brannin vs. Womble*, 82 A. 905; *Galligar vs. Payne*, 84 A. 1067; *Rossier vs. Raine*, 87 A. 283; *Tilton vs. Vignes*, 83 A. 240.

(C) Condition at time of seizure determines:

In construing homesteads, reference is had to the time of seizure; subsequent registry or acquisition of full ownership unavailing.

Barron vs. Sollibellos, 28 A. 856; Marcotte vs. Messich, Man. Unrep. Cases, p. 42; Garnier vs. Sheriff, 89 A. 887; Simon vs. Walker, 28 A. 608.

(D) Do not affect prior contracts:

Homestead laws do not affect contracts entered into prior to their passage.

27 A. 276; 26 A. 149; Poole vs. Cook, 84 A. 881; Gilmer vs. O'Neal, 52 A. 982; Thomas vs. Guilbeau, 35 A. 927; Mills vs. Sheriff, 26 A. 886, 142; Roupe vs. Carradine, 20 A. 244, 374; Martin vs. Kirkpatrick, 80 A. 1216.

Otherwise they would impair obligations of contracts.

Gunn vs. Barry, 15 Wall. 610.

(E) Essential conditions to valid homestead exemption:

1. *Bona fide ownership.* Debtor can not set up as homestead, property he has sought to screen by simulation and fraud from pursuit of creditors.

Gilmer vs. O'Neal, 52 A. 988; Martin vs. Walker, 48 A. 1019.

2. *Full ownership.* Property held in indivision not homestead.

Henderson vs. Hoy & Sheriff, 26 A. 156; Barron vs. Sollibellos, 28 A. 855; Simon vs. Walker, 28 A. 608; Gilmer vs. O'Neal, 52 A. 988; 80 A. 1180; 81 A. 41.

But where property has been partitioned and claimant owns determined number of acres therein, his tenure is sufficient.

Garnier vs. Sheriff, 89 A. 886; Marcotte vs. Messich, Man. Unrep. Cases, p. 42.

3. *Person or persons dependent on claimant for support:*

(a) Persons must be relatives—not mere orphan children supported through charity.

Galligar vs. Payne, 84 A. 1057; Decuir vs. Benker, 33 A. 320.

(b) Dependent persons must be such as are unable to earn living. Dependency must be actual and necessary.

Robust and healthy women are not such dependents.

Decuir vs. Benker, 33 A. 320.

Nor able-bodied husband.

Barron vs. Sollibellos, 28 A. 355; Taylor vs. McElvin, 81 A. 283.

4. *Bona fide residence on property:*

- (a) Short residence for purpose of complying with conditions of law, but abandoned before seizure, is not sufficient.

Bossier vs. Sheriff, 57 A. 262.

- (b) But requirement of residence does not prevent travel for recreation, pleasure, or health, for usual length of time.

Burch vs. Sheriff et al., 57 A. 726.

- (c) By subsequent residence on property specially mortgaged, debtor can not acquire homestead.

Gilmer vs. O'Neal, 52 A. 979.

- (d) But this applies where homestead law enacted subsequent to mortgage.

Fuqua vs. Chaffe & Bro., 26 A. 148; *LeBanc vs. St. Germain*, 26 A. 289; *Roupe vs. Carradine*, 20 A. 244.

5. *Registry of homestead:*

- (a) Exemptions inoperative against debts contracted prior to registry.

Succession of Furnias, 24 A. 1015; see 24 A. 237.

- (b) Widow and minor child or children can not claim homestead when deceased husband or father caused no registry. Until claim to homestead was registered, he was no "beneficiary."

Succession of Furnias, 24 A. 1015.

- (c) Homestead law of 1865 required no registry and none can be required for debts existing prior to Constitution of 1879.

Garnier vs. Sheriff, 89 A. 984; *Thomas vs. Guilbeau*, 25 A. 927.

6. *Claim to homestead must be interposed before judicial sale, and mere notice to sheriff not sufficient.*

Kuntz vs. Baehr, 28 A. 90; *Gilmer vs. O'Neal*, 52 A. 984.

But *aliter* under present Constitution, Art. 219.

7. *Wife must not own property in her own right and be in actual enjoyment of property worth more than one thousand dollars.*

This means claimant's wife in being at time of seizure; not dead wife whose share of community he holds as tutor of his children.

Garnier vs. Sheriff, 89 A. 985.

8. Homestead is for benefit of debtor and law gives family no such rights in homestead as will prevent debtor from confessing judgment on debts that are prescribed.

Martin vs. Kirkpatrick, 30 A. 1213.

Nor can heirs of beneficiary claim exemption; exemption being strictly personal.

Briant vs. Lyons, 29 A. 64.

9. Formerly, prior to Constitution of 1879, town or urban property not entitled to exemption under homestead law. Constitution 1879 removes the restriction.

Crilly vs. Sheriff, 25 A. 219; Hargrove vs. Flournoy, 26 A. 645; Roberts vs. Gordy, 28 A. 575; Singletary vs. Singletary, 31 A. 575; Gilmer vs. O'Neal, 32 A. 982; Poole vs. Cook, 34 A. 331; Baden vs. Reeves, 27 A. 226.

10. Exemption limited to \$2000.

Todd vs. Gordy, 28 A. 667.

11. Mule, cow and fodder exempt.

Ray vs. Hayes, 28 A. 641.

12. Patented lands exempt from execution for prior debts.

Patton vs. Richmond, 28 A. 795.

13. Soil being exempt, mill and machinery thereon are also.

Tison vs. Tanlehill, 28 A. 793.

(F) Who can not claim exemption under C. P. 645, Act 1852. None but farmers can claim. Hence are excluded:

1. Attorneys.

Hargrove vs. Flournoy, 26 A. 646; Crilly vs. Sheriff, 25 A. 219.

2. Succession.

Burnett vs. Walker, 28 A. 335.

3. Printers or ferrymen.

Roberts vs. Gordy, 28 A. 575.

4. Married women.

Fuseller vs. Buckner, 28 A. 594.

Particularly when husband able-bodied.

Taylor vs. McElvin, 31 A. 283.

5. But when husband is deaf mute, imbecile and unable to assist wife.

See Hardin vs. Wolf, 29 A. 333.

(G) Registry of Homestead. To what Debts Homestead not applicable.

Art. 220, of Constitution 1879: "Laws shall be passed as early as practicable for the setting apart, valuation and registration of property claimed as a homestead. Rights to homesteads or exemptions under laws or contracts, or for debts existing at the time of the adoption of this constitution, shall not be impaired, repealed or affected by any provision of this constitution or any laws passed in pursuance thereof. No court or ministerial officer of this State shall ever have jurisdiction or authority to enforce any judgment, execution or decree against the property set apart for a homestead, including such improvements as may be made thereon from time to time; provided, the property herein declared to be exempt shall not exceed in value two thousand dollars. This exemption shall not apply to the following cases, to-wit:

"(a) For the purchase price of said property or any part thereof.

"(b) For labor and material furnished for building, repairing or improving homesteads.

"(c) For liabilities incurred by any public officer or fiduciary or any attorney-at-law for money collected or received on deposit.

"(d) For lawful claims for taxes or assessments."

(H) Registry of Homestead.

By Act 114 of 1880 homestead declaration must (1) be written, sworn to and recorded in book of mortgages for the parish where homestead claimed is situated; (2) it must contain a (a) statement of facts that show the person claiming the homestead and exemption is a person of the description to be entitled thereto; (b) a statement that the person claiming it is residing on the land or lot claimed as homestead and owns it by a *bona fide* title, stating nature of title; (c) a description of the lot or tract of land; (d) an enumeration of the other exemptions; (e) an estimate of the cash value of the homestead and exemptions, a statement of intention to claim such homestead and exemptions.

(I) Cases where homestead not exempt from seizure:

1. For the purchase price of property or part thereof.

Baker vs. Frellsen, 32 A. 830; 28 A. 416; 28 A. 784.

2. Where mortgage has been given for loan to co-proprietors and one subsequently buys other's undivided half, homestead can not be set up against mortgage.

Soullier vs. Benker, 87 A. 162.

3. Subsequent acquisition of rest of undivided property specially mortgaged will not render property subject to homestead exemption.

Brannin vs. Womble, 82 A. 805.

4. Mortgages, privileges and real rights can not be disturbed by homestead rights not existing at time they attached.

Taylor vs. Saloy, 88 A. 62.

5. Fiduciary Debt. Homestead can not be set up against judgment founded on obligation contracted by one in a fiduciary capacity.

Bridwell vs. Halliday et al., 87 A. 410.

6. Conditions justifying exemptions falling, property may be seized after homestead is declared no longer operative.

Denis vs. Gayle, 40 A. 236; *Martin vs. Walker*, 43 A. 1019; *Calvitt vs. Williams*, 85 A. 322; *Lemennier vs. McCearly*, 87 A. 133.

(J) Mortgage of Homestead; Waiver; Right to Sell.

- Art. 222, of Constitution 1879: "The homestead shall not be susceptible of mortgage, except for the purchase price, labor and material furnished for the building, repairing or improving homestead; nor shall any renunciation or waiver of homestead rights or exemptions be valid. The right to sell any property which shall be recorded as a homestead shall be preserved, but no sale shall destroy or impair any rights of creditors therein."

(K) Mortgage of Homestead.

1. Homestead can not be mortgaged except in cases specified.

Soullier vs. Benker, 87 A. 162; 29 A. 530; 29 A. 572.

2. Conventional mortgage given on homestead property enforceable thereon when homestead ceases by removal of owner to another State.

Chaffe & Sons vs. McGehee, 88 A. 278.

3. Having granted mortgage on property, debtor can not acquire homestead by subsequently residing on it.

Gilmer vs. O'Neal, 82 A. 979; but see *contra Fuqua vs. Chaffe & Bro.*, 26 A. 148; *LeBlanc vs. St. Germain*, 25 A. 289.

4. *Right to sell:* Homestead can not be contractually renounced or waived otherwise than by sale or its equivalent.

Colonel vs. Woodward, 40 A. 627.

(L) *Waiver:*

1. Previous to Constitution of 1879 debtor could waive homestead.

Nugent vs. Carruth, 82 A. 444; Gilmer vs. O'Neal, 82 A. 979.

2. One may waive homestead by mortgage.

Nugent vs. Carruth, 82 A. 444; Overruling Hardin & Cert, 29 A. 333.

(M) *Seizure of buildings, cattle working, implements, etc., separately from land:*

1. No seizure and sale of buildings, agricultural implements, or working cattle separately from the land.

Bevens vs. Weill, 80 A. 187; Whiteman vs. LeBlanc, 28 A. 430; 26 A. 340; 4 N. S. 212; Kelly vs. Robertson, 10 A. 808; 23 A. 749; 21 A. 324; 13 A. 227; 25 A. 484; Overruling Domingues vs. Lee, 17 L. 236.

2. But a builder or mechanic may enforce lien on building erected on public property.

McKnight vs. Parish of Grant, 80 A. 361.

3. But above provision may be waived by debtor.

Dorsey vs. Hills, 4 A. 107.

4. And yet this provision has been termed "a positive prohibitory law."

Broadwell vs. Raines, 84 A. 680.

646. Movables Seized First, when there is no Privilege or Mortgage—Pointing out Property—With the exceptions mentioned in the two preceding articles, and if the party prosecuting the execution of the judgment has no privilege or mortgage on the property of the debtor, the sheriff must commence by seizing the movable property; if there be no movables he may seize the immovables, unless the debtor point out himself to the sheriff what property he wishes to have seized and sold first; provided the property thus pointed out be situated in the parish.

1. Debtor not exercising right to point out, loses it.

Heffner vs. Hesse & Verges, 29 A. 155; Nobles vs. Nettles, 3 R. 153.

2. Right is personal, and creditor of seized debtor can not complain.

Hoy & Co. vs. Eaton & Barstow, 26 A. 169.

647. Seizure of Rights, Credits, or Money—But if the debtor has neither movable, nor immovable property, the sheriff may seize the rights and credits which belong to him, and all sums of money which may be due to him, in whatsoever right, unless it be for alimony or salaries of office.

C. P. 644, 1140.

Seizure of rights and credits:

1. Seizure of incorporeal rights—(e. g. : suit or judgment) may be by mere service of notice of seizure on debtor notwithstanding Act of 1839 providing for garnishment process under *fi. fa.*

Levy, Loeb, Scheuer & Co. vs. Acklen, 87 A. 545; McDonald vs. Ins. Co. 82 A. 596; Stockton vs. Downey, 6 A. 585; Stafford vs. Maxwell, 23 A. 847; Rightor vs. Sildell, 9 A. 606; Hanna vs. Bry, 5 A. 656; Nugent vs. McCaffrey, 83 A. 274; Harris vs. Bank of Mobile, 5 A. 538; Nelson vs. Simpson, 9 A. 811.

2. Succession right seizable.

Noble vs. Nettles, 8. R. 152.

3. Shares of stock also.

Parker vs. Ins. Co., 42 A. 1172; Harris vs. Bank, 5 A. 538; Cucullu vs. Ins. Co., 2 R. 571.

648. No Right to Point Out in Cases of Privilege and Mortgage—The debtor shall not have the right of pointing out to the sheriff the property which he wishes him to seize, when the creditor who prosecutes the execution of the judgment, has a privilege or mortgage on part of his property, for in this case the creditor shall have a right to direct the seizure of such property as is mortgaged to him, if he prefers it; but with respect to other property, not subject to his claims, he must conform to the directions above given.

1. Seized debtor has no right to point out property to be seized when creditor has a privilege or mortgage.

Lambeth vs. Sentell et als., 83 A. 691.

2. Debtor falling or refusing to point out property, loses right.

Deville vs. Hayes, 23 A. 550; *Heffner & Hesse vs. Verges*, 29 A. 135; 1 R. 153.

3. Creditor by special mortgage may foreclose on part only of property.

Burgess vs. Gordy, 32 A. 1297; *Powell vs. Hayes*, 31 A. 763.

4. Creditor may compel sheriff to sell specially mortgaged property as a whole and in block.

Morris vs. Womble, Sheriff, 30 A. 1312.

And under usual form of *f. fa.* and without specific description in body of writ.

Dunlap vs. Sims, 2 A. 239.

5. Debtor can not compel seizure of property burdened with mortgage or privilege, except when mortgage or privileged creditor is executing.

Todd vs. Gordy, 29 A. 500; *Laplace vs. Haydel*, 19 A. 363.

649. Right to Point out Lost After Levy of Writ—The debtor shall also lose the right of pointing out to the sheriff the property to be seized, if he allows the sheriff to execute the writ, and advertise for sale the goods seized, without exercising the right.

C. P. 642; *Deville vs. Hayes*, 23 A. 550; see *ante*.

650. Debtor May Designate What Portion Shall be Sold—Nevertheless, the debtor whose land shall have been seized, shall always be entitled to demand that a portion only, which he shall designate, shall be sold, if that portion is sufficient to satisfy the judgment; but if it be insufficient, a sale of the other portions shall be made.

651. Extent of Seizure—The sheriff shall seize the property of the debtor to a sufficient amount to discharge the judgment, as well as interests and costs; he may even seize something beyond this amount, to pay the interest which may become due, and the estimated costs of the seizure and sale.

1. Seizure must be sufficient to satisfy writ, interest and costs.

Heffner & Hesse vs. Verges, 29 A. 149.

2. Liens and mortgages on property should be considered by sheriff in estimating amount of property he should seize to satisfy execution.

Heffner & Hesse vs. Verges, 29 A. 149; 1 N. S. 608.

652. Reduction of Seizure—Nevertheless, if the debtor is of opinion that the sheriff has seized more property than could reasonably be thought necessary to discharge the judgment and costs, he may, on application to the judge who issued the writ, demand that an appraisement be made of the property taken by the sheriff.

And when several writs of *feri facias* have issued to different parishes, defendant shall have a right to have a reduction of excessive seizure in the manner provided by special laws.

Reduction of seizure:

1. Mere excess of seizure no ground for injunction.
Lambeth vs. Sentell, 38 A. 694; Bagley vs. Tato, 10 R. 45; Powell vs. Hayes, 81 A. 789; Burgess vs. Gordy, 32 A. 1279; Gusman vs. DePoret, 33 A. 338; Buisson vs. Staats, 9 A. 236; Heffner & Hesse vs. Verges, 29 A. 149.
2. Notice to seizing creditor necessary in reducing seizure.
Clafflin & Co. vs. Lisso & Scheen, 81 A. 172.
3. When writ issues for more than is due, remedy is by injunction.
Harper vs. Terry, 16 A. 217.

653. Appraisement—Reduction—The judge, on application, shall order that an appraisement of the property seized be made by two competent persons, whom he shall name and swear for that purpose, and if he shall find, by the appraisement, that more property was taken than is necessary to satisfy the judgment, as has been directed above, he shall reduce the seizure to such an amount only as shall be sufficient for this purpose; provided, that un-

less such application be made before the day of sale, it shall in no case have the effect to prevent the sale on the day fixed by the advertisement.

Where separate appraisement is made, sales should be separate.

Gernon vs. Bestick, 15 A. 697.

654. Notice of Seizure—Contents—Division into Lots—

It shall be the duty of the sheriff, as soon as he shall have executed the writ of *feri facias*, to give notice thereof in writing to the debtor, and to annex thereto a list of the property seized, which he shall deliver to him in person, or leave at his place of ordinary residence; and if the property seized be lands, it shall be the duty of the sheriff, at the time when he gives notice of seizure to also notify the defendant to have the lands so seized, divided into lots, pursuant to the constitution, and in manner and form prescribed by special laws.

(A) Notice of seizure. To whom must be given:

1. To seized debtor.

Lapene & Jacks vs. McCan, 28 A. 749.

2. To debtor of incorporeal right seized.

Safford vs. Maxwell, 23 A. 846; Rightor vs. Slidell, 9 A. 605; Hanna vs. Bry, 5 A. 686.

3. To agent of absent debtor.

Walker vs. Allen, 19 L. 811.

(B) Notice to partnership:

1. In ordinary partnerships, notice must be to each member.

Lapine vs. McCan & Son, 28 A. 749.

2. In commercial partnerships notice may be served on any member.

Montague vs. Weil, 80 A. 50; Kearney vs. Fenner, 14 A. 870.

(C) Notice to minors: Notice not valid:

1. When alleged tutrix had not qualified.

O'Hara vs. Folwell, 26 A. 870.

2. When alleged tutrix had lost tutorship by remarriage without consent of family meeting to her retention.

Heroman vs. Institute, 34 A. 811.

(D) Notice vital and essential:

Gray vs. Moylan, 26 A. 75; Jacobshagen vs. Moylan, 26 A. 735.

(E) Waiver of notice:

By appointing appraisers.

Monition of Hall, 21 A. 693.

(F) New notice:

No new notice required on dissolution of injunction.

Walker vs. Villavaso, 26 A. 42.

(G) Sufficiency of notice:

Notice to clerk of court, to defendant, and to plaintiff, operates a valid seizure of right of action pending in court.

Nugent vs. McCaffrey, 33 A. 271.

(H) Notice to tenants:

Notice to tenants not necessary when leased premises are seized.

Pipkin vs. Sheriff, 26 A. 782; Lambeth vs. Sentell, 33 A. 695.

(I) Service of notice:

Service may be made by deputy sheriff, though a minor.

Williamson vs. Richardson, 31 A. 685.

(J) Defendant in execution can not complain that sheriff has seized property not belonging to him, or that seizure is not valid.

Gusman vs. DePoret, 33 A. 333; Calderwood vs. Prevost, 9 R. 182; Deville vs. Hayes, 23 A. 530; Lambeth vs. Sentell, 33 A. 695.

(K) Division into lots:

1. Article 132 of Constitution 1868 not reproduced in Constitution 1879. Act 32 of 1877 repealed Sections 8451, 8452, 8453, 8454, 8756, 8757, 8759 of Revised Statutes carrying out this law.

2. Necessity of division into lots no longer exists.

Morris vs. Womble, 30 A. 1313.

655. Three Days' Delay—Advertisement—Three days after this notice the sheriff shall advertise the sale of the property seized, in the manner and form directed in the following articles.

C. P. 667, 745; Lapene & Jacks vs. McCan, 28 A. 750.

656. Seizure of Houses or Lands Includes Rents and Revenues—When the sheriff seizes houses or lands, he

must take at the same time all the rents, issues and revenue, which this property may yield.

C. P. 1141.

(A) Seizure of houses and lands, and rents thereof:

Sheriff need not serve notice on tenants, only on debtor.

Lambeth vs. Sentell et al., 38 A. 692; Pipkin vs. Sheriff, 36 A. 731; Carroll vs. Chaffe, 35 A. 83.

(B) Seizure not affected by failure to collect rent:

Failure to collect rent does not invalidate seizure; it may make sheriff liable to seizing creditor.

Pipkin vs. Sheriff, 36 A. 781.

(C) When sheriff not liable:

1. Sheriff not liable for refusal to collect rents when third party in possession claims ownership under recorded title, and where he is refused an indemnity bond.

White, Richards & Co. vs. Waggaman, 36 A. 984.

2. Nor is he liable for rents not collected from defendant and owner in possession of property as residence and where plaintiff declines sheriff's offer to allow him to use his name for all useful purposes.

Coste vs. Handy et als., 34 A. 862; Chaffe & Co. vs. Purdy, 43 A. 388.

(D) Right to rents:

1. From time of seizure, creditor has right to rents which he may recover by action against tenant even before delay for usual proceedings to effect sale.

Lamore vs. Cox, 32 A. 1045; 2 A. 450; 17 L. 203; Stockton vs. Hyde, 3 A. 800; Silverstein vs. Stern, 21 A. 748.

2. Seizure includes rents of property where lease not recorded.

Winn vs. Elgee, 6 R. 100; Summers & Brannins vs. Clark, 30 A. 438; Anderson vs. Comeau, 33 A. 1119; Townsend vs. Payne, 42 A. 914; Chaffe vs. Purdy, 43 A. 389.

3. And lessee under such lease liable to seizing creditor though he have paid rent by anticipation or furnished negotiable notes for it.

Anderson vs. Comeau, 33 A. 1119.

4. Lessee may claim dissolution of lease, but if he remain in possession, there is tacit reconduction in favor of seizing creditor.

Id.; Stockton vs. Hyde, 5 A. 800.

(E) Lessee can not deny title of sheriff:

Lessee can not contest title of sheriff, whose title is that of lessor.

State ex rel. Fredricks vs. Judge, 33 A. 146; Phelps vs. Taylor, 23 A. 596; 17 A. 154; 10 L. 362; 8 R. 218; 11 L. 178; 10 A. 622; 6 R. 189.

(F) Power of sheriff to rent:**1. Sheriff may lease and sue for rent.**

State ex rel. Fredricks vs. Judge, 33 A. 150; Phelps vs. Taylor, 23 A. 595; Courtney vs. Hunt, 5 A. 174; Paul vs. Hoss, 28 A. 854.

2. And must account for rent and proceeds of seizure.

Silliven vs. Gyarre, 20 A. 305; 29 A. 358.

(G) Seizure of rented property:

Immovables, leased or rented, can not be actually taken possession of by sheriff.

Decoux vs. Bank, 2 A. 157; Pipkin vs. Sheriff, 36 A. 782.

(H) Liability of sheriff:

Sheriff alone liable for illegal manner of discharge of duty where seizing creditor gives no instructions.

Gusman vs. DePoret, 33 A. 384; Barrimore vs. McFeeley, 32 A. 1182; Monssieur vs. Zuntz, 14 A. 15; 11 A. 476.

657. Seizure of Plantation—Appointment of Overseer—

If it be land or a plantation which he has taken, unless the same has been leased or rented, it shall remain sequestered in his custody until the sale

Consequently, he may appoint a keeper or an overseer to manage it, for whom he shall be responsible.

C. P. 1142.

(A) Appointment of keeper:**1. Sheriff may appoint a keeper, for whom he is responsible and whose possession is that of sheriff.**

Paul vs. Hoss, 28 A. 854; Trounstein vs. Rosenham, 22 A. 525; Stille vs. Beauchamp, 18 A. 604; 8 A. 370; Smith vs. Burwick, 12 R. 25; Budd vs. Stinson, 20 A. 573; Watkins vs. Cawthorn, 33 A. 1199; Winn vs. Elgee, 6 R. 100; Whann vs. Huffy, 12 A. 280.

2. Seizure valid though sheriff do not eject seized debtor.

Paul vs. Hoss, 28 A. 854; Budd vs. Stinson, 20 A. 573; Watson vs. Bon-durant, 21 Wall. 123.

(B) Who may be keeper:

He may appoint owner keeper. But some keeper must be appointed so as to complete and perpetuate possession of sheriff.

Kilbourne vs. Frellsen, 22 A. 207; Page vs. Generes, 6 A. 551; Boyle vs. Ferry, 12 A. 426; Gonbeau vs. R. R. Co., 6 R. 347; Simpson vs. Allain, 7 R. 500; Watson vs. Boudurant, 21 Wall. 123; Corse vs. Stafford, 4 A. 263; Estate of Mills vs. Hebert, 19 A. 58; 12 A. 775; Williams vs. Clark, 11 A. 761; Fluker vs. Bullard, 2 A. 338; Gaines vs. Merchants' Bank, 4 A. 370.

(C) Debtor not liable for keeper's fees—when.

When appointment of keeper unnecessary, as in New Orleans, in seizures of real estate, he can not charge for keeper's fees.

Baltimore vs. Parlange, 25 A. 337.

658. Sheriff Receives Rent and May Lease to Time of Sale—If it be a house which he has seized, it also remains sequestered in his custody; he may receive the rent from those who occupy it: he may even lease it, provided it be not for a time beyond that appointed for the sale.

659. Movables Seized Must Be Safely Kept—When the objects seized consist of money, movables, or beasts, he should put them in a place of safety, under the penalty of being responsible for the loss or injury which they may sustain through his fault or neglect.

Safekeeping of movables:

Sheriff must put movables seized in place of safety.

Parkison vs. Boyle, 7 R. 82; Mayes vs. Schmidt, 11 A. 476; Latolais vs. Bank, 33 A. 1444.

660. Immovables by Destination Not Removable—Nevertheless, the sheriff can not remove from lands or plantations, the implements of agriculture, the cattle employed in cultivating them, but he may appoint a guardian or overseer for their preservation.

Revenues of property can not be seized and sold separately from the property.

Bank vs. Barranco, 29 A. 355.

661. Necessary Disbursements for Preservation or Cultivation—Until the sale, the sheriff is authorized to make such disbursements as are necessary for their preservation, or even for their cultivation or clearing if things seized consists of lands or plantations.

Necessary disbursements:

1. Should be estimated in computing amount of suspensive appeal bond.

State ex rel. Vial vs. Judge, 86 A. 910; *Hatle vs. Bills*, 9 R. 509.

2. Sheriff can not charge for "responsibility and care generally."

Farrar vs. Rowley, 8 A. 276; *Witouski vs. Witouski*, 16 A. 283.

3. Sheriff may make all necessary disbursements—e. g., appoint overseer and make advances.

Learned vs. Walton, 42 A. 455; *Lockhart vs. Morey*, 41 A. 1165; *Lambeth vs. Sheriff*, 41 A. 749.

4. Such advances and disbursements must be proved.

Witouski vs. Witouski, 16 A. 282.

662. Sheriff Can Not Hire Out Animals Seized Except by Consent—The sheriff can not lease or hire out the animals he may have seized, unless he be authorized expressly by the court with the consent of both the parties.

§ 2.

Of the Sale and Adjudication of Property Seized Under the Writ of Fieri Facias.

663. Debtor May Pay Down to Moment of Adjudication—The debtor may, down to the moment of adjudication, prevent the sale of the property taken, and obtain its release, by paying into the hands of the sheriff the amount of the judgment, with interest and costs.

C. P. 74, 269.

Seized debtor may bond execution.

R. S. 3411; *State ex rel. Roth vs. Judge*, 87 A. 847; *Heffner & Hesse vs. Vergez*, 29 A. 149.

664. Sale at Seat of Justice—The sale of the property must be made by the sheriff at the seat of justice for the parish where the seizure is made, and he shall choose for the place of sale, the spot where it may have the greatest degree of publicity, except in the cases enumerated in the following articles.

Place and time of sale

Act 146 of 1888 amends and re-enacts Act 25 of 1876, R. S. 8410, so as to read as follows: "Hereafter all sheriff's sales and coroner's sales shall be advertised to take place at the court house, or at some other public place in the vicinity of said court house, on any Saturday in the month, commencing at 11 o'clock A. M., after the expiration of the time required by law for advertisement of such sales, and the said sheriff or coroner shall have the right to adjourn said sale to the Monday following, and then from day to day, only in case there shall not be time to conclude the same in one day; provided, however, nothing contained herein shall deprive the defendant of the privilege now enjoyed by him of having his property when it is under seizure offered for sale at his domicile upon his giving notice to the proper officer within three days after notice of seizure."

665. Sale on Plantations—Notice—In the country, the sale may be made on the plantations which are to be sold, if the debtor require it; but in this case notice must be given of the fact in the advertisement of sale.

666. Sale of Animals and Utensils Attached to Plantations—Animals and utensils attached to plantations and manufactures, and such articles as can not be easily removed, must be sold on the spot where they are taken, on the day and hour appointed for this purpose by the sheriff.

1. Sale of animals and utensils attached to plantations and manufactures made on spot, and with plantation.

Lepine & Jack vs. McCan, 28 A. 749; Bank vs. Crooks & Maristany, 2 A. 524.

2. But sale of plantation and fixtures may be made at seat of justice unless debtor require it to be made on the plantation.

Walker vs. Villavaso, 26 A. 42.

667. Advertisement Three Days After Notice—Three days after the sheriff shall have given notice to the debtor of the property seized from him, unless an injunction issue to prevent him, he must advertise the sale of such property at the day, place, and hour, which he shall designate for that purpose in the manner hereinafter directed.

O. P. 655.

Advertisement:

1. Waiver of advertisement:

Esnault vs. Cooley, 16 A. 165.

2. Length of time of advertisement:

(a) For land, thirty days.

Gernon vs. Bestick, 15 A. 697.

Even when sale is re-advertised.

Montgomery vs. Barrow, 19 A. 169; Monilton of Hall, 21 A. 698.

(b) For movables, ten days.

O. P. 670.

3. Imperfection of advertisements not waived by presence of debtor at sale without objection.

Humphreys vs. Brown, 19 A. 168.

4. Want of thirty days' advertisement cured by prescription of five years.

Robinson vs. Williams, 45 A. 485.

668. Advertisements in English Only—Every sale must be announced by public advertisements, composed in English only.

O. P. 655, 968.

(A) Public sales; language of advertisements:

1. Judicial advertisements in French language.

Act 38 of 1880, passed in pursuance of Constitution of 1879, Article 154, "regulates judicial advertisements in the French language in the parish of Orleans," and provides "That in

the parish of Orleans where advertisements are required to be made in relation to judicial proceedings, or in the sale of property under judicial process, or in any other legal proceeding of whatever kind, they shall be published also in the French language, in a daily newspaper of good standing published in the French language, and which shall have been so published as a daily paper for at least one year consecutively prior to the designation to be made according to the second section of this act. That said publication in the French language shall be made in precisely the same manner and for the same number of times, and on the same terms as by existing laws are required or may be required thereafter for the publication of judicial advertisements in the English language," etc.

2. Cost, selection of paper, etc.

Act 91 of 1876: To regulate the manner of making advertisements in judicial proceedings and sales of property under judicial process in all parishes other than that of Orleans, regulating the price therefor, and directing the manner and price at which contracts should be made by police juries or municipal corporations, except New Orleans, for public printing.

SECTION 1. That in all parishes other than that of Orleans, where advertisements are required to be made in relation to judicial proceedings or in the sale of property under judicial process, they shall be published in a newspaper printed in the parish in which the judicial proceedings are carried on, or in which the sale is to take place, and if there be no newspaper published in said parish, the advertisements shall be made by posting them at or on the door of the court house, and two other public places at different parts of the parish.

SEC. 2. That when there are two or more newspapers published in the parish the defendant shall have the right of selecting a newspaper in which the advertisement is to be made, if applied for within three days after notice of such proceedings or the seizure made under the process. If the defendant neglect to select, then the plaintiff shall have the right to do so, and in default of either plaintiff or defendant selecting, the sheriff shall select.

SEC. 3. That the costs of such advertisements shall not ex-

ceed the rate of one dollar for every hundred words or fractional part thereof, for the first insertion, and fifty cents for each subsequent insertion. If such newspaper refuses to publish at the rate herein specified, they shall be published by posting at or on the door of the court house and two other public places in the parish wherein such publication is to be made.

SEC. 4. That the police juries and municipal corporations in all parishes other than that of Orleans shall not hereafter order public printing of any kind unless the same is done under contract and adjudication to the lowest bidder, after due public notice given, and the prices therefor shall not in any case exceed the price hereinbefore fixed for judicial advertisements where applicable, and for other printing or job work they shall in no case exceed the maximum price which may be allowed for State printing.

(C) Right secured to debtor under Section 2 must be exercised before advertisement is made, else it is lost.

Soulier vs. Benker, 87 A. 162.

(D) Judicial advertisements in parish of Orleans.

See Act 49 of 1877, Sec. 15, et seq.

669. Advertisement in Official Journals—These advertisements must be inserted in the official journals selected and contracted with pursuant to special laws.

C. P. 288, 969; Freeman vs. Stacey, 2 A. 615.

670. Ten Days' Advertisement for Movables—Thirty Days for Steamboats, Ships and Immovables—The sale of movable effects can only be made ten days after the first notice which has been given, and that of ships, steamboats and immovables, only thirty days after the same notice.

Advertisement of seizure of "an action for the recovery of an immovable estate or an entire succession" which is an immovable (C. P. 471) must be for thirty days.

Nugent vs. McCaffrey, 83 A. 274.

671. Notice to Appoint Appraiser—Who Appoints—In Successions—Appraisers in Orleans and Jefferson—

Ten days before proceeding to the sale of the property seized, if it consists of immovables, the sheriff shall summon the party whose effects are seized, by a written notice, delivered to him in person, or left at his usual place of residence, to appear on the day, place and hour which he shall mention to him, for the purpose of naming an appraiser of the property to be thus sold; provided, that in the parishes of Orleans and Jefferson, it shall be sufficient that the plaintiff in the suit shall be one appraiser, the defendant another, or such person as the plaintiff or defendant may designate; and in the event of their disagreement, the sheriff or auctioneer making the sale shall constitute the umpire, whose decision shall be final, and no fees shall be allowed to any officer or other person for appraising property; and in all cases where property belonging to a succession is to be sold, where appraisements are required previous to the sale, it shall be sufficient that the administrator, executor, tutor, or other person representing the succession, shall constitute and be one appraiser; and the creditor on whose application the property is sold, or one of the heirs, if sold to effect a partition, shall be and constitute the other; and the sheriff, or auctioneer making the sale, shall be the umpire; provided, that in the event there are several plaintiffs or several defendants, several creditors or several heirs, the court shall designate which one of the respective parties shall be and constitute one appraiser, and which one the other, unless the parties agree among themselves by whom they shall be represented; and in the event any party shall neglect or refuse to qualify under the provisions of this act, the property shall be sold without any appraisal whatever.

(A) Notice to appoint appraisers:

1. Revised Statutes, Sec. 576, requires only two days.

2. When party has actually appointed appraiser, it is idle to inquire if he had notice.

Foster vs. Roussel, 3 A. 546.

(B) *Appraiser's fee:*

- Can not be exacted where party himself acts.

Baltimore vs. Parlange, 25 A. 387.

(C) *By whom appointed:*

- Not by justice of peace. He has no such power.

Gallagher vs. Abadie, 26 A. 343.

(D) *Waiver of appraisal:*

1. Benefit of appraisal is for debtor's protection, which he may waive. *Potest quisque renunciare jus pro se introductum.*

Jouet vs. Mortimer, 29 A. 206; 15 A. 245; Martin vs. Lake, 37 A. 763; 22 A. 69; Desplate vs. Martin, 7 A. 91.

And refusing to qualify as appraiser amounts to waiver.
Id.

2. Waiver lawful, particularly in a contract of mortgage.

Jouet vs. Mortimer, 29 A. 206; Broadwell vs. Rodriguez, 18 A. 68; Ins. Co. vs. Bagley, 19 A. 87; Soniat vs. Miles, 33 A. 164; see Levioks, Barrett & Kuen vs. Walker, 15 A. 245; 16 A. 170; 5 A. 306.

3. And this is so even if mortgagor be minor acting by tutor on advice of family meeting.

Martin vs. Lake, Sheriff, 37 A. 763.

4. Waiver illegal when judgment debtor is in failing circumstances.

Succession of Hilligsberg, 1 A. 340; Lawrence, Syndic, vs. Young, 1 A. 297.

(E) *Appraisal essential when not waived.*

Phelps vs. Rightor, 9 R. 531; Stockton vs. Stanbrough, 3 A. 390; Succession of Hilligsberg, 1 A. 340; McDonogh vs. Gavier's Curator, 9 L. 530.

(F) *Appraisal not necessary:*

- Where sale is on a twelve months' bond.

Wallis vs. Thomas, 6 A. 76; Fink vs. Lallande, 16 L. 547.

672. Naming Appraisers—Sheriff Appoints In Case of Refusal—If the party appear and name his appraiser, the creditor shall have the right of naming the other, and

if either the plaintiff or defendant refuse to appoint an appraiser, he shall be appointed by the sheriff, in the name of the plaintiff or defendant, who shall have refused or neglected to make the appointment.

C. P. 770.

673. Oath of Appraisers—The appraisers thus named shall, before proceeding to make an appraisement, take an oath before the sheriff of the parish, or before a judge or justice of the peace, to make a true and just appraisement of the property seized, whether for cash or for the time or credit designated by the parties, as provided above.

Oath may be waived:

If party's attorney be appraiser, and he do not demand to be sworn, his waiver binds his principal.

Keenan vs. Ahern, 54 A. 887; Nicholls vs. Meroler, 15 A. 574; Mullin vs. Follain, 12 A. 883; 21 A. 64.

674. Appointment of Umpire—His Oath—If they can not agree in their appraisement, they shall name an umpire, who shall also be sworn; and if they can not agree on the choice of an umpire, the sheriff shall name one.

675. Report of Appraisers—When the appraisers shall have been thus named and sworn, they shall proceed together to appraise the property taken, and after having reduced this appraisement to writing, and affixed their signature or ordinary mark, they shall deliver it to the sheriff to serve as a basis for the sale.

676. Appraisement Must Be Minute—Separate Sale or in Block—The effects seized must be appraised with such minuteness, that they may be sold together, or separately, to the best advantage of the debtor, as he may direct.

(A) Mode of appraising:

Appraisement of undivided interest of an heir in a succession should show number of heirs, value of assets, and amount of debts.

Hickman vs. Freret, 80 A. 1067; *Diamond vs. Courtney*, 12 A. 251; *Mayo vs. Stroud*, 12 R. 106; *Noble vs. Nettles*, 8 R. 152.

(B) Separate appraisement:

When separate appraisement necessary and is not made, privilege is lost if thing on which it exists is sold confusedly with a mass of other property.

Succession of Rogers, 41 A. 400; 87 A. 8, 837.

677. Crying of Property—On the day and hour appointed for the sale, the sheriff or his deputy shall repair to the place where it is to be made, and shall proceed to cry the property taken, after having read, in an audible voice, the notice declaring the nature and description of it.

678. Mortgage and Conveyance Certificates—If they are lands, or other objects susceptible of being mortgaged, which are to be sold, the sheriff, after having declared of what they consist, as directed in the preceding article, shall also read, in an audible voice, the certificate which he shall have obtained for this purpose from the office of the register of mortgages in the parish where the sale is made, to show whether there exist any privileges or mortgages on the property offered for sale; provided, that in the parish of Orleans, a certificate, from the register of conveyances, showing that the vendor had not alienated in any other way the property about to be sold by him, shall be read by the sheriff, said certificate to give a clear description of said property; and the sheriff neglecting to procure such certificate before passing any act of sale, shall be liable to a fine of not less than two hundred and fifty dollars, nor more than five hundred dollars, and

costs of court, one-half for the benefit of the complainant, and the other half for the benefit of the State.

(A) Reading of certificate:

Failure to procure certificate or to read it nullifies adjudication.

McRae vs. Chapman, 10 R. 65; Perry, Syndic, vs. Holloway, 10 R. 107.

But such nullity is relative only and may be ratified.

Ins. Co. vs. Pike, 33 A. 325.

(B) Duty of recorder of mortgages:

To furnish certificate showing all incumbrances on property, even when not in name of defendant in execution.

Smith vs. Moore, 9 R. 63; McRae vs. Chapman, 10 R. 67.

(C) As to taxes on property:

Sheriff need not announce amount of taxes due.

Gusman vs. LeBlanc, 27 A. 290.

(D) As to anterior mortgages and privileges:

Sheriff must announce that purchaser shall have a right to retain amount of such mortgages and privileges or else adjudication is null.

Whitehead vs. Cramer, 9 A. 216; Southern Mutual Insurance Company vs. Pike, 33 A. 323; DeArmas vs. Wagner, 3 N. S. 606.

But such nullity is purely relative.

Loucks vs. Bank, 2 A. 617; Robinett vs. Compton, 2 A. 361; Whitaker vs. Ashbey, 43 A. 117; Lane vs. Cameron, 36 A. 773; Whitehead, Receiver, vs. Wiley, 9 A. 214; Fernandez vs. Bein, 1 A. 52; Trudeau vs. McVicar, 1 A. 426.

679. Sale Subject to Privileges and Mortgages—When there exists a mortgage or privilege on the property put up for sale, the sheriff shall give notice, before he commences the crying, that the property is sold subject to all privileges and hypothecations of whatsoever kind they may be, with which the same is burdened, and with the condition that the purchaser shall pay in his hands whatever portion of the price for which the property shall be adjudicated, which may exceed the amount of the privileges and special mortgages to which such property is subject.

Sale subject to privileges and mortgages:

1. Adjudication invalid where notice is not given by sheriff that property is sold subject to existing privileges and mortgages, with right of retention of the amounts to satisfy the same.

McRae vs. Chapman, 10 R. 65; 9 L. 542; Perry vs. Holloway, 10 R. 107; Southern Insurance Company vs. Pike, 33 A. 525.

2. But this nullity is only relative.

Whitehead vs. Cramer, 9 A. 216; Loucks vs. Bank of Tennessee, 2 A. 617; Robnett vs. Compton, 2 A. 361; Mutual Insurance Company vs. Pike, 33 A. 525.

680. Sale Must Bring Two-Thirds of Appraisement—
Re-offer—These previous steps being taken, the sheriff shall proceed to the sale and adjudication of the property taken, and if the price offered by the highest and last bidder does not reach two-thirds of the appraisement made on it, as directed above, then the thing shall not be adjudged, and the sale shall be postponed for fifteen days if it be immovable property, and ten days if it be movable, counting from the fresh notice which shall be given by the sheriff, in the manner hereafter directed.

(A) Nullity of sale made for less than two-thirds of appraisement:

Nullity relative and prescribed by five years.

Lawrence vs. Birdsall, 6 A. 698; C. C. 3543; Vincent vs. D'Aubigne, 19 A. 529.

And debtor in execution can not complain where purchaser subsequently pays taxes and penalties which, together with bid, exceed two-thirds of appraisement.

Mills vs. Waggaman, 28 A. 561.

(B) Sale for less than two-thirds of appraisement:

1. In sale of succession property to pay debts under C. P. 990, 991 and 992, even minor's property may be sold for less than two-thirds of appraised value.

Towles vs. Weeks, 7 L. 812; Carter vs. McManus, 15 A. 641; Succession of Hood and Wife, 33 A. 466; Succession of Escaraquell, 36 A. 155; Valdere vs. Bird, 10 R. 396; Overruling Succession of Tabary, 31 A. 409.

2. And also in partition proceedings even when some co-owners are minors.

Bayhi et al. vs. Bayhi et al., 35 A. 530; Buddecke vs. Buddecke, 31 A. 574; Life Association of America vs. Hall, 33 A. 52; Ventress vs. Brown, 30 A. 1013; 15 A. 697; Shaffet vs. Jackson, 14 A. 154; 14 A. 178; 9 L. 179; 2 A. 558; 21 A. 258.

3. In executory proceedings against succession proper.

Vincent vs. D'Aubigne, 19 A. 539.

681. Sale on Twelve Months' Credit—The sheriff, on giving notice of the place, day and hour of this new crying, must announce that it will be made at twelve months' credit, the purchaser being required to furnish good and sufficient joint security, and special mortgage on the things sold, bearing interest from the day of adjudication, at the same rate as that allowed by the judgment.

C. P. 682, 708, 716, 717, 718, 719.

(A) Twelve months' bond: Effect of taking bond:

1. Does not transfer ownership, create vendor's lien, change title or possession, nor novate debt.

Succession of Heltzer, 25 A. 116; Lafayette vs. Preston, 8 A. 1

2. It does not satisfy judgment.

Gourgue vs. Summers, 8 R. 175; Dunlap vs. Sims, 2 A. 266.

3. Hence on a sale under twelve months' bond, judgment creditor is entitled to same privileges he enjoyed under the judgment.

Turner vs. Parker, 10 R. 154.

4. Style of original suit maintained in bond.

Dunlap vs. Sims, 2 A. 241.

5. Execution may issue on judgment instead of bond.

Trescott vs. Lewis, 11 A. 184.

(B) Who may buy under bond:

Executor, representing the estate, with a view of obtaining time to pay debt.

Lafayette vs. Preston, 8 A. 381.

(C) No law authorizes taking of second bond. Execution thereon may be stayed.

Weick vs. Babin, 21 A. 230.

(D) Defences of surety:

1. He can not allege any irregularities in the sale as long as his principal holds the property.

Weick vs. Babin, 21 A. 230; 2 L. 860; Jones vs. Frelsen, 9 R. 135, 136; Coons vs. Graham, 12 R. 206; Wafer vs. Wafer, 7 A. 542; Succession of Quinn, 34 A. 890.

2. Twelve months' bond must be paid by privilege and preference over all claims, except expenses of sale, fixing sales, etc.; sheriff's costs and clerk's costs.

Succession of Rogers, 41 A. 401; Succession of Forstall, 39 A. 1052; Succession of Lauve, 18 A. 721; Succession of Markey, 2 A. 265.

3. Where bond and advertisement do not call for such interest as allowed by the judgment, the sale is null.

Wright vs. Higginbotham, 10 R. 52.

682. Sale on Twelve Months' Bond—At this second adjudication, the thing seized shall be adjudged to the highest and last bidder for whatever it will bring, on twelve months' credit, according to the terms mentioned in article six hundred and eighty-one.

683. Purchaser May Retain Sum to Pay Privileges and Mortgages in Favor of Third Persons—Twelve Months' Bond Special—But if there exist on the property any privileges or special mortgage in favor of other persons than the judgment creditor, and which are preferred to him, the sheriff shall announce that the purchaser shall be entitled to retain in his hands, out of the price for which the property was adjudicated, the amount required to satisfy the privileged debts and special hypothecations to which the property sold was subject, but that he shall be bound to give his obligation for the surplus of the purchase money, if there be any, and subscribe his obligation at twelve months' credit, with security as is stated above.

(A) Retention of bid:

1. Where seizing creditor has privilege and conventional mortgage first in rank, he may retain amount of bid sufficient to pay himself.

Copes vs. Gullbeau, 34 A. 1037; Blair & Co. vs. Taylor & Irving, 25 A. 144; Succession of Triche, 29 A. 384.

2. Purchaser at succession sale may retain amount to satisfy special mortgage.

Succession of Forstall, 39 A. 1053; Morris vs. Cain, 34 A. 657; Denegre vs. Mushet, 46 A. 90.

(B) Who may not retain bid:

1. Mere general mortgagee.

Godechaux vs. Succession of Dichary, 84 A. 579; *Alford vs. Montejo*, 28 A. 593; *Pasley vs. McConnell*, 28 A. 475.

2. Junior or concurrent mortgagee.

Lehman, Newgass & Co. vs. Ranson, 27 A. 279; *Succession of Triche*, 29 A. 886.

(C) Duty of sheriff to retain amount of liens in advance of seizing creditor.

Cummings vs. Erwin, 15 A. 289; *Fireman's Ins. Co. vs. Gillingham*, 1 R. 265; *Bacas vs. Hernandez*, 81 A. 87; *Succession of Triche*, 29 A. 887.

684. No Adjudication Where Bid Insufficient—Consequently, if the price offered in this case by the highest and last bidder, is not sufficient to discharge the privileges and mortgages existing on the property, and which have a preference over the judgment creditor, there shall be no adjudication, and the sheriff shall proceed to seize other property of the debtor, if there be any.

No valid adjudication—when.

1. There is no valid adjudication where the bid insufficient to discharge privileges and mortgages superior to judgment creditor.

Dunning vs. Coleman & Co., 27 A. 48; *Hills vs. Jacobs*, 7 R. 406; *Bacas vs. Hernandez*, 81 A. 87.

2. But the nullity of the adjudication is only relative; it may be declared at suit of prior mortgagee, or defendant in execution; but third persons can not treat it as nullity and attack it collaterally.

Lawrence vs. Birdsale, 6 A. 638.

3. The rule in this article applies only to special or conventional mortgages, and not to judicial or general mortgages.

Pasley vs. McConnell, 28 A. 475; *Kelly vs. Cook*, 7 A. 614; *Sittig vs. Morgan*, 5 A. 574; *Young vs. Municipality No. 1*, 5 A. 736; *Loucks vs. Union Bank*, 2 A. 619; *Trudeau vs. McVicar*, 1 A. 426; *Fernandez vs. Bein*, 1 A. 52.

4. Nor where incumbrances are tax mortgages, privileges and liens.

Laplace vs. Laplace, 43 A. 235; *Pasley vs. McConnell*, 28 A. 475.

5. It is sheriff's duty to pay the tax before making the deed.

Laplace vs. Laplace, 43 A. 235; *Friedlander vs. Bell*, 17 A. 44.

685. Sale Need Not Bring Sufficient to Pay Incumbrances Posterior to Seizing Creditor—If the seizing creditor be a vendor, or has any privilege or special mortgage on the property seized and offered for sale, which is anterior or entitled to a preference over other privileges or special mortgages existing on said property, he may, notwithstanding what is contained in the preceding article, require that the property be sold at any price to pay him, although the purchase money be not sufficient to satisfy all the privileges or mortgages with which such property is burdened.

1. Adjudicatee may retain in his hands enough to pay off incumbrances in excess of price of adjudication over amount called for by writ.

Morris vs. Cain's Executors, 34 A. 663; *Johnson vs. Duncan*, 24 A. 881.

2. Where adjudicatee pays into sheriff's hands more than writ calls for, the sheriff individually becomes his agent, and adjudicatee has no recourse against sheriff's sureties for diversion of funds.

Morris vs. Cain's Executors, 34 A. 663; *Bacas vs. Hernandez*, 31 A. 87; *Merchants' Bank vs. Peters*, 2 R. 214; *Pepper vs. Dunlap*, 16 L. 163.

686. Sale Where Some Instalments are not Due—When a seizing creditor has a privilege or special mortgage on the property seized, for a debt of which all the instalments are not yet due, he may demand that the property be sold for the whole of the debt, provided it be on such terms of credit as are granted to the debtor by the original contract for the payment of such instalments as are not due.

Penouilh vs. Abraham, 44 A. 189.

(A) Sale for cash:

Where property is sold under one of a series of mortgage notes, the sheriff may sell for cash when the notes are past due.

Keenan vs. Ahern, 34 A. 887.

(B) Sale on credit:

1. Mortgage creditor may force sale on falling due of first instalment; purchaser to assume other notes on same terms.

Union Bank vs. Smith, 10 R. 49; Pepper vs. Dunlap, 16 L. 164; Chaffraix & Agar vs. Packard, 26 A. 172; Rice vs. Schmidt, 11 L. 70; Branner et al. vs. Hardy, 18 A. 687.

2. Where credit instalments mature pending seizure, sale may be for cash.

Dwight vs. Richard, 5 A. 885; McClellan vs. Bideman, 5 A. 862; McCalap vs. Fluker, 12 A. 551; Panouilh vs. Abraham, 44 A. 189.

3. Transferees of portions of a mortgage debt are entitled to be paid pro rata without regard to time when they were transferred.

Perrot vs. Levasseur, 21 A. 529; Begnaud vs. Rob, 21 A. 624; Adams vs. Leah, 8 A. 144.

4. And if holder of two or more out of a series of concurrent mortgage notes transfers one with priority over his other notes, his agreement will not give transferee priority over notes in other hands.

Laplace vs. Laplace, 48 A. 283.

687. Real Charges Pass With Property to Purchaser—

When a property seized and sold is subject to any real charge, as usufruct, use, habitation, servitude or others, it is sold with all these burdens, and the purchaser is bound to fulfil them himself, or permit the enjoyment of them, over and above the price to be paid.

(A) Real charges pass with property—e. g.:

1. Special mortgage.

Newman vs. Eaton, 27 A. 841; Insurance Company vs. Warren et al. 87 A. 87.

2. Unexpired portion of recorded lease.

Bartels vs. Creditors, 11 A. 482; D'Aquin vs. Armant, 14 A. 217; Haydes vs. Shiff, 12 A. 524; Lehman & Co. vs. Dreyfus, 37 A. 588.

(B) What things pass to purchaser:

1. Ungathered crop belonging to owner of seized place.

Porche vs. Bodin, 28 A. 762; C. C. 465, 466; Bludworth vs. Hunter, 9 R. 264; Williamson vs. Richardson, 31 A. 686.

- (a) But not where seized debtor is permitted by creditor to cultivate the place with his own means.

Richardson vs. Dinkgrave, 26 A. 652; Sandel vs. Douglas, 2 A. 628.

- (b) Nor can seized debtor champion rights of other alleged privileged creditors.

Williamson vs. Richardson, 81 A. 685.

2. Buildings pass with land.

Pohlman vs. DeBouchel, 82 A. 1156.

- (a) And all immovables by destination, in sale under mortgage

Williamson vs. Richardson, 81 A. 685; Weil vs. Lapeyre, 88 A. 808.

- (b) And batture formed since mortgage was given passes with the property.

Hollingsworth vs. Chaffe, 88 A. 547.

(C) What will not pass:

1. Crop belonging to lessee.

Porche vs. Bodin, 28 A. 762; Sandel vs. Douglas, 27 A. 628.

2. But lessee holding after the sale, owes purchaser rent.

Barelli vs. Szymanski, 14 A. 47.

688. Creditor and Debtor May Bid—The debtor may himself bid for his property seized and offered for sale, on the same terms as every other person.

The case is the same with respect to the judgment creditor.

1. Judgment creditor may become purchaser.

Baillio vs. Williams, 5 N. S. 214; Williams vs. Gallien, 1 R. 94; Farrar vs. Stacey, 2 A. 210; Graham vs. Egan, 15 A. 99; Waters vs. Smith, 25 A. 515.

2. Where judgment is annulled on devolutive appeal after execution, judgment creditor must restore property and put debtor in same position as before sale.

Graham vs. Egan, 15 A. 99.

But when judgment is only partially reversed, obligation of purchaser is to restore only excess of price.

Waters vs. Smith, 25 A. 515; Pasley vs. McConnell, 88 A. 474; Farrar vs. Stacey, 2 A. 210.

689. When Adjudicatee Refuses to Accept—If the person to whom the property has been adjudged shall refuse to pay to the sheriff the price of the adjudication, or to offer the proper sureties when the sale has been made on

credit, the sheriff shall expose to sale anew the thing seized, and adjudge it to another person.

C. P. 708, 719.

(A) *When adjudicatee refuses to comply with bid:*

1. Adjudicatee refusing to comply with bid is responsible in damages under C. C. 2611 for difference between first and second offering. But second offer must be strictly same as to quantity of property, terms and conditions as first offering.

Municipality vs. Hennen, 14 L. 559; *Hodge vs. Moore*, 3 R. 401; *Petit vs. Laville*, 5 R. 117; *Guillotte vs. Jennings*, 4 A. 242; *Jennings vs. Hodge*, 16 A. 321; *Labauve vs. McCabe*, 34 A. 184; *Stewart vs. Spaulding*, 6 L. 152.

2. Every condition precedent (such as tendering deed) must be fulfilled.

Smith vs. Kinney, 3 A. 332; *Jennings vs. Hodge*, 16 A. 321.

3. Under C. P. 689, if sheriff grant delay, it is at his own risk.

Gallier vs. Garcia, 2 R. 319; *Walker vs. Allen*, 19 L. 307.

4. Sheriff is judge of solvency and sufficiency of security offered.

Michel vs. Kaiser, 25 A. 57.

5. Sheriff holds possession pending rule to annul sale.

Bayon vs. Breedlove, 3 R. 333.

6. Adjudication null where adjudicatee refuses to pay to sheriff.

Haynes vs. Breaux, 16 A. 143; *Rowley vs. Kemp*, 2 A. 261; *Hille vs. Jacobs*, 7 R. 416; *Losee vs. Santon*, 24 A. 370.

But where creditor enters satisfaction upon execution to extent of bid, he waives right to insist on payment in currency.

Haynes vs. Breaux, 16 A. 143; *Commissioners, etc., vs. Hodge*, 1 R. 450.

7. Sheriff need not put in default adjudicatee refusing to pay bid.

Branner & Co. vs. Hardy, 18 A. 537; *Losee vs. Santon*, 24 A. 372.

But *aliter* where adjudicatee has not openly refused.

Doll vs. Katham, 23 A. 486; *McCall vs. Irion*, 41 A. 1126.

8. Duty of sheriff to resell.

Gallier vs. Garcia, 2 R. 319; *Walker vs. Allen*, 19 L. 307; *Stute vs. Voorhes*, 4 L. 39; *Dobard vs. Bayhl*, 36 A. 136; *Losee vs. Santon*, 24 A. 370.

(B) *Where second adjudication brought more than the first, first adjudicatee may have action for difference, but not where right is reserved to reject bids.*

Batt & Michel vs. New Orleans, 26 A. 754.

(C) *Specific compliance with bid:*

Vendor may compel specific compliance with bid.

Doll vs. Katham, 28 A. 483, and cases cited; McCall vs. Irion, 41 A. 1125; Pasley vs. McConnell, 39 A. 1097.

(D) *Adjudicatee must pay before he can demand deed.*

Loosee vs. Santon, 24 A. 370; 4 L. 395; 3 L. 475; 2 L. 360.

690. Effect of Adjudication—The adjudication thus made has, of itself alone, the effect of transferring to the purchaser all the rights and claims which the party in whose hands it was seized might have had to the thing adjudged.

(A) *Effect of adjudication:*

Adjudication alone vests title in adjudicatee.

Lane vs. Cameron, 36 A. 778; Washburn vs. Green, 18 A. 332; Succession of Goodrich, 6 R. 107; Copes vs. Gullbeau, 84 A. 1087; Pasley vs. McConnell, 39 A. 1097; Pasley vs. McConnell, 38 A. 475; Commissioners vs. Hodge, 8 R. 450; McCall vs. Irion, 41 A. 1127; Interdiction of Onorato, 46 A. 78.

And thereafter seized debtor can not maintain possessory action.

Winn vs. Elgee, 6 R. 100.

(B) *Remedy of adjudicatees to cancel incumbrances:*

1. Adjudicatee may rule sheriff to make title, and all creditors having privileges or mortgages to show cause why they should not be erased.

Merrick vs. Causland, 24 A. 256; Larthet vs. Hogan, 1 A. 330.

2. Subsequent irregularities, such as taking illegal bond, do not vitiate valid adjudication.

Wright vs. Higginbotham, 10 R. 30; 3 N. S. 439.

3. To annul sale under a judgment which is null, nullity of judgment must be demanded.

Gillis vs. Carter, 29 A. 701; Anderson vs. Carroll, 23 A. 176.

4. And when court has jurisdiction, judgment or order of sale not collaterally attacked.

Dupuy vs. Bemiss, 2 A. 509.

691. Act Confirming Adjudication—Within three days after the adjudication, the sheriff shall pass an act of sale to the purchaser of the property or effects adjudged by him, in the manner and form hereafter directed.

Act Executed by Successor of Sheriff Making Sale—Provided, that, in all cases where a sheriff shall have adjudicated any real estate to any purchaser, by virtue of a writ of *feri facias*, or of seizure and sale, and the said sheriff shall have died, resigned, or been removed from office, or shall die, resign, or be removed from office, without having passed an act of sale to such purchaser, it shall be lawful, and the duty of his immediate or other successor in office, to pass such act of sale, and to have the same recorded as directed by law.

1. Deed controls return. In case of conflict between return and deed of sheriff, latter controls.

Carroll vs. Sheen, 84 A. 425; *Durnford vs. DeGruys*, 8 M. 222; *Dufour vs. Camfrane*, 11 M. 675; *Bally vs. Percy*, 14 L. 22; *Hunter vs. Buckner & Bro.*, 29 A. 607.

2. Adjudicatee may rule sheriff to make deed, though he have bought only undivided part.

Montros vs. Jamison, 30 A. 172.

3. Sheriff's *proces verbal*, signed by sheriff and purchaser and two witnesses, is equivalent to deed.

Straus vs. Soye, 29 A. 270; *Jouet vs. Mortimer*, 29 A. 206; *Davis vs. Wilcoxon*, 5 A. 583.

4. Where sheriff adjudicating dies, his successor may make deed.

Covas vs. Bertoulin, 45 A. 161; *Bradley vs. Frelsen*, 10 A. 310; *State ex rel. Morgan vs. Judge*, 11 A. 79; *Bell vs. Keefe*, 12 A. 340.

692. Recitals of the Act—This act of sale must be made by and in the name of the sheriff of the parish where the seizure was made, be signed by him in his official capacity, with a mention of the place, the day, the month, and the year in which it was passed.

Deputy sheriff may sign deed.

Keller vs. Blanchard, 21 A. 40.

693. Recitals of the Act—Continued—This act must make mention:

1. **Writ—**Of the writ by virtue of which the object has been seized and sold.

2. **Title of Cause—**Of the title of the cause in which the writ has been issued.

3. **Names of Plaintiff, Defendant, and Purchaser—**Of the names and surnames of the defendant, plaintiff and purchaser.

4. **Nature of Thing Sold, Price, Conditions—**Of the nature of the object sold, with a description of it, as well as of the price and conditions on which it has been adjudged.

5. **Payment of Price—**Of the manner in which the purchaser has paid the price, or bound himself to discharge it.

6. **Amount of Privileges or Mortgages—**Of the amount of the privileges or mortgages with which the property adjudicated is incumbered, and which were made known at the time of the adjudication.

7. **Special Mortgage to Secure Price—**And finally, of the special mortgage which he has given to secure the payment of this price, where the sale has been made on a credit.

694. Terms of Act—The sheriff shall conclude this act, by selling and transferring to the purchaser all the right which the former owner had in the thing sold, pursuing the same forms as in ordinary sales.

695. Omission of Formalities in Deed will not Invalidate Adjudication—This act of sale adds nothing to the force and effect of the adjudication, but is only intended to afford the proof of it.

Consequently, if the sheriff has omitted any of the formalities above prescribed, the adjudication shall not be

void on that account, if it otherwise appear that it was made by virtue of a legal authority, and with all the forms requisite for its validity.

C. P. 690, 692, 698.

Adjudication vests title in adjudicatee.

Copes vs. Guilbeau, 84 A. 1087.

696. Sheriff Must Record in Mortgage Office—When—

If this act of sale includes a special mortgage, to secure the payment of the price stipulated, the sheriff shall have it recorded before sending it to the clerk, as is directed in the following article.

697. Recordation in Clerk's and Conveyance Offices—

The sheriff shall, within ten days at farthest from the adjudication, deliver or direct to the clerk of the court which issued the writ of *feri facias*, the original of the act of sale which he has passed to the purchaser for the object sold to him, whether on credit or for cash, and it shall be the duty of the clerk to record this act literally in a record to be kept by him for that purpose, and to indorse on the original his certificate of the registry; provided, that in the city of New Orleans, it shall be the duty of said sheriffs to cause to be recorded in the conveyance office all judicial sales of real property, besides having said sales recorded in the clerk's office, as is now required by law.

698. Act Makes Proof of Contents—This act, thus recorded and delivered to the purchaser, shall be held as full proof of what it contains, in all the courts of this State, in the same manner as an act before a notary would be.

Copy of—And a copy of any such deed of conveyance, certified to be correct by the officer in whose office such deed is recorded, shall be received in evidence, and have the same effect as a duly certified copy of an authentic act;

and if the original of any such deed has been lost or mislaid, without the same having been recorded in the manner provided by law, then a copy of the same, certified as aforesaid, being recorded in such office, shall have the same effect in every respect, from the time the same shall be recorded, as if the original had been recorded; provided, that the affidavit of any person, interested in having such deed recorded, shall be sufficient to establish that the same has been lost or mislaid, and authorize the recording of a copy of the same as aforesaid.

Deed of sheriff does not require signature of parties.

Brooks vs. Walker, 8 A. 150; *Neson vs. Weis*, 34 A. 1009; 12 A. 164; 6 R. 26.

699. Sheriff's Record of Sales—The sheriff shall set down in a book kept by him for the purpose, an exact account of all sales made by him on seizures, and in the account he shall make mention of the sale, the articles sold, the name of the purchaser, and of the price due or paid by him. This book shall be open for the inspection of all persons interested who shall wish to examine it.

C. P. 702.

700. Return of Sheriff on Writ—Duration of Writ—In Cases of Injunction—The sheriff who has made a seizure and sale, within thirty days at the farthest, from that on which he received the writ, if he has sold only movable effects, and within seventy days from the same time, if they be ships, steamboats, or immovables that he has sold, if so long a time has been necessary to effect a sale, shall deliver or direct to the clerk of the court the original of the writ, on which he shall indorse a return, signed by himself, of the manner in which he has executed it, as is directed hereafter.

However, the delay for making this return does not run, but is suspended, if the judge enjoins the sheriff not to proceed in the sale, so long as the injunction continues.

C. P. 642; 41 A. 1127.

Return of sheriff. Effect:

1. Return is proof of deed to purchaser.

Straus vs. Soye, 29 A. 270.

2. Return makes full proof when uncontradicted.

Neson vs. Wels, 34 A. 1009; *Zuberbier & Behan, vs. Prudhomme*, 41 A. 1049.

3. But does not prevail over deed.

McCall vs. Irion, 41 A. 1127.

701. Return of Writ After Sale—But if the sheriff has been able to sell the property seized, before the expiration of the time allowed him in the preceding article, he shall immediately after the sale return to the clerk of the court the original writ, and his report as above directed.

702. Recitals of Return—In his return the sheriff shall specify the object seized and sold, and shall declare whether the sale was made for ready money or on credit, who was the purchaser, at what price, and on what conditions.

C. P. 699.

703. Disposal of Twelve Months' Bond—When the sale has been made on a credit of twelve months on account of the object sold not having been carried to two-thirds of its appraised value, at the first crying, the sheriff must dispose of the bond with security, which he has caused to be executed by the purchaser in the manner directed in the following paragraph.

C. P. 681, 717.

§ 3.

Of the Consequence of the Adjudication and of the Payment of the Price.

704. Sheriff Pays Creditor—When the sheriff has sold for ready money, he shall, on simple demand, pay to the judgment creditor, or his attorney, the sum coming to him from the price of adjudication, unless the court en-

joins him not to make the payment; and if there remain a surplus after the suing creditor is paid, as well as the costs, the sheriff shall deliver such surplus to the debtor.

C. P. 764.

1. Where claims to the fund conflict, sheriff will hold until all things are determined in a concursus.

Bowman vs. McElroy, 14 A. 594; *Bank vs. Tureaud*, 40 A. 149.

2. Sheriff may retain his costs and those of clerk.

Connors vs. Ins. Co., 22 A. 330.

705. Duty of Sheriff Taking Notes from Separate Purchasers—If the sale has been made on a credit either for the whole or a part, and payable in notes, by virtue of a permission to that effect granted by the parties, the sheriff shall take from the purchaser separate notes for the portions respectively coming to them, and shall deliver the notes in the same manner as when the sale is made for ready money.

C. P. 681.

706. Where There Are Privileges or Special Mortgages Besides Suing Creditor—But when the property sold is subject to privileges or special mortgages in favor of other persons besides the suing creditor, the sheriff shall require from the purchaser, and he shall be compelled to deliver to the creditor, whether the sale be made for ready money or on credit, only the surplus of price beyond the amount of the privileges or special mortgages, if there be any surplus.

C. P. 679, 683, 718.

1. Sheriff retains the amount of prior privileges or special mortgages outranking suing creditor.

Alford vs. Montejo, 28 A. 598; *Quertier vs. Hille*, 18 A. 65.

2. Purchaser may retain amount necessary to cover notes concurrent with those of suing creditor.

Johnson vs. Duncan, 24 A. 331; *Howe vs. Whited*, 21 A. 499; 14 A. 149. *Bacas vs. Hernandez*, 31 A. 85; *Pepper vs. Dunlap*, 16 L. 163; *Ins. Co. vs. Gillingham*, 1 R. 305; *Cummings vs. Erwin*, 15 A. 239; *Merchants Bank vs. Peters*, 2 R. 214.

And against such a purchaser, reinscription of the mortgage not necessary.

Noble vs. Cooper, 4 R. 44; *Johnson vs. Duncan*, 24 A. 332.

707. Where Suing Creditor Has Privilege or Special Mortgage—On the other hand, if the suing creditor himself has a privilege or special mortgage, which is preferable or anterior to other mortgages existing on the property sold, the sheriff shall require of the purchaser the payment of the price, the amount of the privilege or special mortgage of the seizing creditor, and the purchaser shall apply the surplus of the price, if there be any, to paying the special mortgages existing on the property, subsequent to that of the suing creditor.

C. F. 679, 684.

Retention of surplus by purchaser:

1. Purchaser's duty is to retain surplus—not to pay it to the sheriff. If he does, it is at his risk. Sheriff has no authority to receive.

Cummings vs. Erwin, 15 A. 239; *Scott vs. Featherstone*, 5 A. 313; *Merchants' Bank vs. Peters*, 3 R. 214; *Quartier vs. Succession of Hillé*, 18 A. 67; *Pepper vs. Dunlap*, 16 L. 173; *Ins. Co. vs. Gillingham*, 1 R. 303.

2. Sureties of sheriff not liable if he receive money beyond the writ.

Bacas vs. Hernandez, 31 A. 85.

708. Release of Subsequent Mortgages by Sheriff—The purchaser is bound for nothing beyond the price of his adjudication, and if, after paying the suing creditor, as directed in the preceding article, there remains nothing more due, to discharge the mortgages subsequent to that of the suing creditor, the sheriff shall give him a release from these mortgages.

1. Sheriff must apply balance of proceeds after paying seizing creditor to satisfaction of subsequent general mortgages before he can give release.

Gourgne vs. Summers, 8 R. 179.

2. But where no balance remains he is authorized to cancel subsequent incumbrances.

Hart vs. Foley, 1 R. 378.

709. Hypothecary Action to Enforce Privileges or Mortgages—The hypothecary action lies against the purchaser of a property seized, which is subject to privileges or mortgages, in favor of such creditors as have said privileges and mortgages, in the same manner and under the same rules and restrictions as are applicable to a third possessor of a mortgaged property.

C. P. 61, 74.

Privilege and mortgage creditors may proceed by hypothecary action against purchaser of property.

Quertier vs. Succession of Hille, 18 A. 66; Tunnard vs. Hill, 10 A. 247; 8 A. 542; 16 L. 170.

710. When Purchaser May Retain Amount to Cover Outstanding General Mortgage—If there exist a general mortgage on the property resulting either from a legal or judicial mortgage, the purchaser can not avail himself of this mortgage, although it be duly recorded, to retain part of the price for the purpose of paying it, or to refuse paying the price, if that has not been already done, unless there has been a suit commenced against him, in virtue of this general mortgage, to make him quit the property, or unless he has just reason to fear that such a step will be taken, in which case he may retain the price, unless the suing creditor shall relieve him from this disturbance, or give him proper security against it.

C. C. 2557 (2535).

711. Eviction of Purchaser—His Recourse—However, if the purchaser has been evicted from the thing adjudged to him, on the ground that it belongs to another person than the party in whose hands it was taken, he shall in that case have his recourse for reimbursement against the

seized debtor and the seizing creditor; but upon the judgment obtained jointly for that purpose, the purchaser shall first take execution against the debtor, and upon the return of such execution, no property found, then he shall be at liberty to take out execution against the creditor.

712. Liability of Suing Creditor to Purchaser—The suing creditor shall be allowed his action against the party in execution for the reimbursement of whatever he shall have been thus obliged to pay to the purchaser, upon the return of the execution, no property found belonging to the debtor.

C. C. 2621 (2690).

713. Liability of Party in Execution to Purchaser—On the other hand, if the purchaser is obliged to quit the property sold to him, on the hypothecary action of the creditor who had a legal or judicial mortgage on all the property of the party in execution, or if he has paid the amount of such mortgage to avoid being dispossessed, he shall only have recourse to the party in execution, and not to the suing creditor.

C. C. 2621 (2699).

714. Purchaser Loses Redress—When—The purchaser shall even lose the redress granted by the two preceding articles, if an action is instituted against him, for the purpose of evicting him, and he neglects to give notice of it to the party from whom the property was seized, provided this party possessed the means of repelling the demand, if informed of its having been made.

C. C. 2617, 2618; C. P. 888.

715. Discussion of Debtor's Property—The purchaser against whom a suit is commenced by a creditor having a legal and judicial mortgage on the property of the debtor sued, may require the creditor to discuss the other prop-

erty which the debtor has in his possession, and even that which he has alienated since the purchase, because the creditor who has a general mortgage can only act against the property of which his debtor has disposed, in the order in which the alienations have been made, beginning at the most recent, and ascending to the most ancient.

C. C. 8408; C. P. 71.

1. Minors with general mortgage against tutor must have recourse first on property not specially hypothecated; and in default of property free from special mortgage, may proceed against such property.

Laplace vs. Haydel, 19 A. 363.

2. And minor must proceed against property owner by tutor before he can attack alienations by the tutor.

McHugh vs. Stewart, 12 A. 361.

716. Twelve Months' Bond—Duty of Sheriff—When the sale has been made on twelve months' credit, by reason of the property not having been bid for at two-thirds of the appraisement, if the whole price be coming to the judgment creditor, including interest and costs, as provided for in the preceding paragraph, the sheriff shall require from the purchaser his bond with security for the benefit of the judgment creditor, and shall, if required, deliver the bond to the latter, on his paying all the costs which are due.

C. P. 68.

Twelve months' bond can not be taken under C. P. 261.

(Sale of perishable property under attachment.)

Levin vs. Lacy, 26 A. 270.

717. Two or More Bonds—When—But if there be several judgment creditors, or if a portion of the purchase money is to be paid over to the debtor, the sheriff shall take from the purchaser as many bonds as may be necessary to deliver to each party his just portion, after deducting costs.

C. P. 681, 703, 716.

718. Privileges and Special Mortgages—Deduction to Fix Amount of Bond—If the purchaser has bought a property subject to privileges or special mortgages, the sheriff can only require his bond with security for the surplus of price, after deducting the amount of these privileges or special mortgages.

C. P. 679, 706.

719. Fi. Fa. on Twelve Months' Bond—If the purchaser who has given his bond with security refuse or neglect to pay it when due, together with the interest, the clerk who first issued the order of seizure shall, on the demand of the judgment creditor or any other person interested, and on the bond being delivered to him, issue an execution for the amount, both against the purchaser and his surety, in the same manner as on a final judgment; and this execution shall be directed to the sheriff, to be carried into effect.

C. P. 689, 703.

1. Effect of bond:

(a) Does not extinguish claim of seizing creditor.

Fillastre vs. St. Amand, 32 A. 352; *Offut vs. Hendsley*, 9 L. L. Baham vs. Langfield, 16 A. 156; *Dunlap vs. Sims*, 1 A. 20. *Lafayette vs. Preston*, 3 A. 352.

(b) But surety paying bond does not acquire judgment.

Crow vs. Walsh, 3 A. 540; *Trent vs. Calderwood*, 2 A. 93; *Turt vs. Allen*, 3 A. 66; *Old vs. Chambliss*, 3 A. 205.

2. Parties can not by private convention give their agreement the force and characteristics of a twelve months' bond.

Strother vs. Richardson, 30 A. 1269.

3. Fi. fa. issues on bond.

Bank vs. Dejean, 12 R. 17; *Lafayette vs. Preston*, 3 A. 352.

4. Debtor in bond may waive appraisement.

Stockett vs. Johnson, 22 A. 89; *Broadwell vs. Rodriguez*, 18 A. 74.

5. What defences cut off by bond: Invalidity of seizure, advertisement and sale.

Bracy vs. McGuire, 34 A. 997; *Jones vs. Frellsen*, 9 R. 185; *Water vs. Wafer*, 7 A. 542; *Ooons vs. Graham*, 12 R. 209.

6. Effect of sale: It passes property free from mortgages which are referred to the proceeds.

Fillastre vs. St. Amand, 32 A. 354; *Follain vs. Broussard*, 9 R. 72.

720. Execution on Twelve Months' Bond (Continued)—

If the amount of the bond, with interest and costs, be not paid to him on demand, it is the duty of the sheriff, under this execution, to seize immediately the property of the purchaser, or of the surety, or of both, to the amount of the debt and costs, and to sell it for ready money.

C. P. 682, 990.

721. Recitals of Fi. Fa. on Twelve Month's Bond—

Sale for Cash After Advertisement—It shall be the duty of the clerk who issues the execution according to the provisions of article seven hundred and twenty, to indorse thereon that the same issued on a twelve months' bond, and that the property to be seized under the same shall be sold for whatever it will bring in cash, and it shall be the duty of the sheriff to execute the same by seizing the property of the principal or security, or both, and to sell the same for whatever it will bring in cash after making the advertisement required by law.

C. P. 682.

722. Seizure Under Fi. Fa. Confers Privilege—

The creditor, by the mere act of seizure, is invested with a privilege on the movable and immovable property thus seized, which entitles him to a preference over other creditors, unless the debtor has become bankrupt previous to the seizure.

C. C. 8186; C. P. 896, 898, 801, 402, 408.

1. No privilege where no valid seizure.

Goubeau vs. R. R. Co., 6 R. 848.

2. Where seizure valid, privilege results, even if debtor be insolvent.

Byrne & Co. vs. Creditors, 83 A. 204; 8 R. 106; 7 Otto, 80.

3. Rank of the privilege; it prevails over unrecorded consignee's privilege.

Loeb & Co. vs. Blum, 26 A. 282.

723. Seizures Rank in Order of Levy—When several

successive seizures are made of the same property, the creditors making them are entitled to a preference over other ordinary creditors, according to the order of their seizures.

C. P. 408.

724. Privilege by Sequestration and Provisional Seizure Incomplete Until Recognized by Judgment—Provisional seizures and sequestration give no privilege to those who have made them, until they have obtained a judgment and order of execution on the property sequestered or provisionally seized.

C. P. 264, 265, 275, 284, 289, 408, 1127.

725. Privilege in Executory Process and in Actions in Rem—But the provisional seizure in executory proceedings and in actions *in rem* gives the same privilege as the seizure in execution.

C. P. 292.

SECTION IV.

Of Imprisonments on Judgment.

726. Sheriff Calls on Defendant to Point Out Property—When the sheriff to whom an execution is directed can find no property to seize, he may call upon the party against whom the execution is awarded to point out to him property which he may possess in the parish.

1. Calling on debtor to point out is not necessary when he is not present or represented.

Cooper vs. Rhodes, 30 A. 533.

2. Nor is it sheriff's duty to call on attorney.

Opothlarholer vs. Gardner, 15 L. 512.

3. Nor need sheriff call on plaintiff to point out when his attorney directs return of *nulla bona*.

Pinard vs. George, 30 A. 384.

727. Return Nulla Bona—When—If, on this application, the debtor shows him no property, and the judgment

creditor is unable to point out any, the sheriff shall return the execution into court, after indorsing on it a report signed by him, in which he shall declare that he has found no property to seize, notwithstanding the demand made of the parties.

1. Instructions by plaintiff's attorney to make a return *nulla bona* relieves sheriff from necessity of calling on plaintiff to point out.

Pinard vs. George, 80 A. 884.

2. But under ordinary circumstances, demand to point out must be made on all the parties.

Gayoso vs. Hickey, 4 L. 801; Hill vs. Labarre, 12 A. 419; Levols vs. Thibodaux, 18 A. 284; Waldo vs. Bell, 18 A. 829; Perkins vs. Bard, 16 A. 448; Shepard vs. Stewart, 20 A. 191.

3. Insolvency of defendant does not excuse sheriff from calling on plaintiff to point out.

Taylor vs. Hancock, 19 A. 466; Gasquet vs. Robins, 2 A. 370; Magee vs. Robbins, 2 A. 411; 18 A. 829.

728. Alias Writ—If, after this report, the judgment creditor discovers any property belonging to his debtor, he may obtain a new execution, to be carried into effect in the same manner as the one first issued.

729. Forced Surrender of Property—Imprisonment—Any judgment creditor who shall have issued execution, which has been returned "no property found," after due demand, shall have the right to compel his debtor to make a surrender of his property, by proceeding in the manner prescribed by special laws; and should the debtor fail or refuse to make a surrender within the time fixed by the judge, he shall order the debtor to prison, there to remain until he shall obey the order, unless he pays the amount of the judgment, with interest and costs.

C. P. 210, 238; 1012.

Release from imprisonment.

Mere surrender will not work discharge from imprisonment. Creditors must first accept.

Burdon vs. Creditors, 20 A. 284; State ex rel. Cawley vs. Judge, 45 A. 948; Caldwell vs. Bloomfield, 2 L. 508.

730. Capias Against Public Officer—Whenever a judgment is rendered against a sheriff, or other public officer, for money by him or them received, in his or their official capacity, and converted to his or their own use, or not accounted for, and the writ of *feri facias* is returned “no property found,” a *capias ad satisfaciendum* may be taken out and executed against such defendant or defendants.

731. Arrest of Absconding Debtor—If a debtor against whom a warrant of imprisonment has been rendered, shall flee into another parish, to avoid being imprisoned, he may be arrested by the sheriff or any constable bearing the order, in the parish where he shall be found, without further certificate or formality.

Arrest of absconding debtor under above article and of insolvent under Sec. 1803 *et seq.* of R. S. 1870, does not conflict with Act of 1840 abolishing the writ of *ca. sa.*

Mayewski vs. His Creditors, 40 A. 95, 108; *Anderson vs. Brindley*, 1 A. 126; *Thornhill vs. Christmas*, 10 R. 343.

CHAPTER VII.

OF EXECUTORY PROCESS.

732. Executory Process—Executory process can only be resorted to in the following cases:

1. **Confession of Judgment by Authentic Act, with Privilege or Mortgage**—When the creditor's right arises from an act importing a confession of judgment, and which contains a privilege or mortgage in his favor.

2. **Execution of Judgment Rendered in this State, but in Other Jurisdiction**—When the creditor demands the execution of a judgment which has been rendered by a tribunal of this State different from that within whose jurisdiction the execution is sought.

Provisional Seizure—The proceeding by provisional

Provisional Seizure—The proceeding by provisional seizure (attachment) or *in rem*, resembles in some sort the executory process, but should not be confounded with it, as they are subject to different rules.

C. P. 265, 63, 70, 96, 163, 268, 617, 746, 752.

(A) Death of mortgagor:

Death of mortgage debtor does not bar executory process.

Lamoree vs. Succession of Cox, 82 A. 246; Gally vs. Dowling, 80 A. 823; Guilbeau vs. Wiltz et als., 26 A. 600; Durand vs. Delahoussaye, 20 A. 623; Boguille vs. Faillie, 1 A. 204; Dupuy vs. Beniss, 2 A. 513, 209, 145; McCalop vs. Fluker, 12 A. 552; Succession of Wilson, 12 A. 591; Berens vs. Executors of Boutte, 81 A. 112; Bank vs. Heirs of Jorda, 45 A. 189; Killeba vs. Barrett, 87 A. 987; Nicholls vs. Grice, 6 A. 447; Lavillebeuve vs. Frederic, 20 A. 875; but see, *contra*, Graham, vs. Markey, 22 A. 266; Bank vs. Marigny, 11 R. 211; State vs. Judge, 20 A. 811.

2. Judgment recognizing a mortgage can not be executed by *fi. fa.* against a succession.

Succession of Patriok, 25 A. 155; 1 A. 178.

3. Nor was a decree of confiscation a bar against mortgagee executing mortgage against mortgagor alone.

Avegno vs. Schmidt, 115 U. S. 233; Chase vs. Gas Light Co., 45 A. 307.

(B) Cession by mortgagor, accepted by creditor, is a bar to executory process.

Syndic alone can sell property.

Wheeler vs. Stewart, 18 A. 678; 18 A. 292; Phillips & Co. vs. Creditors, 44 A. 675; Edgerton vs. Creditors, 2 R. 201; Clarke vs. Rosenda, 5 R. 27; 9 R. 219.

But *aliter* now under Act 15 of 1894 process may issue when special mortgage contains pact *de non*. Syndic party.

(C) No change allowed from *via ordinaria* to *via executiva*.

Berens vs. Executors of Boutte, 81 A. 112; Succession of Patriok, 25 A. 154; Jenkins vs. Griggaby, 12 A. 642; DeGray vs. Hennen, 2 A. 489.

1. But change to *via ordinaria* is permissible, plaintiff paying costs of *via executiva*.

Dumouchel vs. Lemerlok, 21 A. 81; Brooks vs. Walker, 8 A. 150.

2. These two modes of proceeding can not be employed simultaneously. Plea of *lis pendens* applies.

Taylor vs. Hill, 21 A. 639; 8 N. S. 96.

3. But mere opposition of mortgage creditor to account of executor ignoring his claim is not such process *via ordinaria* waiving right to *via executiva*.

Berens vs. Executors of Boutte, 81 A. 112; Carroll vs. Chaffe, 35 A. 96.

4. Nor is a mere ancillary proceeding by sequestration to hold immovables by destination removed by mortgagor.

Learned vs. Walton, 42 A. 455.

(D) *Change from via executiva to via ordinaria can not be made by court without consent of creditor.*

Calhoun vs. Bank, 39 A. 772; Chambliss vs. Atchison, 2 A. 488; Tildon vs. Dees, 1 R. 407.

(E) *Authentic evidence essential to support order of seizure and sale*
—e. g.:

1. Of endorsement of mortgage note.

Miller, Lyon & Co. vs. Cappel & Curry, 35 A. 264; Chaffe vs. Carroll, 3 A. 115; Chaffe vs. Carroll, 34 A. 122; Wood & Roane vs. Wood, 32 A. 504; Burps vs. Naughton, 24 A. 476; Ricks vs. Bernstein, 19 A. 141; Tufts vs. Beard, 9 A. 310; Commercial Bank vs. Poland, 6 A. 477; French vs. Mechanics' Bank, 4 A. 153; Mattoe vs. McCrystal, 11 A. 14; (Marionneau vs. Dardenne, 28 A. 457, overruled); Van Raatte vs. Congregation, 39 A. 617.

But where act declares that notes are endorsed in blank by maker or payee, that is sufficient.

Chaffe & Sons vs. Dubose, 36 A. 257; Garrish vs. Hyman, 29 A. 26; Dejean vs. Hebert, 31 A. 729; Scott, Williams & Co. vs. Turner, 15 A. 346; Mathe vs. McCrystal, 11 A. 4; Race & Foster vs. Bruce, 11 A. 34; Bank vs. Poland, 6 A. 474.

2. Of amount of indebtedness of tutor on special mortgage.

Mortgage itself is not confession of judgment for specific sum.

Ritter, Dative Tutrix, vs. Succession of Faescl, 34 A. 416; Lhan vs. Dee et als., 31 A. 217.

3. Of majority of plaintiff when such majority was term of exigibility of debt.

Hoffman vs. Stelb, 22 A. 267.

4. Of authority of agent to execute mortgage.

Crescent City Bank vs. Blanque, 32 A. 264; Dosson vs. Sanders, 12 R. 238; Gandoz vs. Blanque, 28 A. 520; Tildon vs. Dees, 1 R. 407.

5. Of authorization by judge to wife to borrow money or of the fact that money enured to her separate benefit.

Calhoun vs. Bank, 30 A. 772.

6. Of attorney's fees or premiums of insurance.

L'Hote vs. Dubuch, 26 A. 717; State vs. Citizen's Bank, 33 A. 765.

Failure to mention these in writ is equivalent to waiver.

Socha vs. Renaldo, 26 A. 500.

7. Of identity of note.

Ricks vs. Bernstein, 19 A. 141; Taylor vs. Boedicker, 31 A. 170; Chambliss vs. Atchison, 2 A. 489.

8. Of exact balance due on revolving mortgage notes.

Ward vs. Douglass, 22 A. 464.

9. Of premium of insurance and costs of protest.

Pele vs. Meaux, 17 A. 60; *Cumming vs. Archinard*, 1 A. 279; *Nicholls vs. Grice*, 6 A. 466; *Linton vs. Pardon*, 9 R. 482.

10. Of presentment for payment at place stipulated in mortgage note for payment.

Moss vs. Byrnes, 12 L. 615; but see *Roman vs. Denny*, 17 A. 127; 18 A. 98; 12 A. 551, 671.

(F) *Where authentic evidence is impossible from nature of case, it is not essential—c. g.:*

1. Of appointment of syndic, curator or others suing *en autre droit*.

Dosson vs. Sanders, 12 R. 239; *Chaffe vs. Carroll*, 25 A. 115.

But evidence of appointment must be exhibited.

DeBrueys vs. Freret, 18 A. 80; *Landry vs. Landry*, 12 A. 167; see *contra Bayly vs. McKnight*, 19 A. 522; 2 A. 276; 11 A. 34, 4; 14 A. 435.

2. Of costs of executory process, i. e., cost of protest, copy of mortgage act, etc.

Fazende vs. Flood, 24 A. 425; *Umrloh vs. Grow*, 24 A. 306; *Duraa vs. Ferrari*, 25 A. 81.

3. Of existence of debt due to pledgee suing to collect mortgage note pledged to him.

Insurance Company vs. Lozano, 29 A. 321; *Chaffe & Sons vs. Whitfield*, 40 A. 631; 36 A. 269.

4. Of agreements made subsequent to the mortgage act.

Pargoud vs. Richardson, 26 A. 675.

5. Of identity of plaintiff acting *sui juris*.

Bana vs. Simms, 26 A. 147.

6. Of absence of debtor.

Frost vs. McLeod, 19 A. 80.

7. Of payment with legal subrogation by one solidary debtor.

Duraa vs. Ferrari, 25 A. 81.

(G) *Executory process may issue on prescribed note.*

1. Judge can not supply plea.

Mulholland vs. Scott, 33 A. 1048; *Williamson vs. Richardson*, 30 A. 1163; *Watts vs. Bradley*, 20 A. 523; *Ferroux vs. Lacoste*, 19 A. 267; *Gill vs. Guinault*, 20 A. 219; *Berens vs. Executors*, 31 A. 112; *Overruling Ferroux vs. Lacoste*, 18 A. 626; *Bank vs. Dosson*, 7 A. 550; *Fowler vs. Beatty*, 10 A. 275; *McMasters vs. Mather*, 4 A. 419.

2. And plea of prescription can not be filed on appeal.

Dufossat vs. Lalzer, 24 A. 618; *Gill & Guinault vs. Hosmer*, 20 A. 219; *Ferroux vs. Lacoste*, 19 A. 266; but see *Taylor vs. Hill*, 21 A. 267, where such plea was sustained.

(H) Executory process by Citizens' Bank:

It issues to collect contributions due by stockholder.

Latiolais vs. Citizens' Bank, 33 A. 1445; Citizens' Bank, vs. Deynood, 25 A. 628; Mitchell vs. Logan, 24 A. 993.

(I) Innocent holder of mortgage note:

Equities between original parties do not prejudice rights of innocent holder.

Billgery vs. Ferguson, 30 A. 84; Brewer vs. Gay, 24 A. 36; Hunter vs. Buckner, 29 A. 604.

(J) Appeal in executory process:

1. What issues are to be determined on appeal from order of seizure:

(a) Sole question is sufficiency of evidence to authorize fiat.

Durao vs. Ferrari, 25 A. 80; Parkerson vs. Grundy, 23 A. 530; Shreveport vs. Flournoy, 26 A. 709; Fazende vs. Flood, 24 A. 426; Dupre vs. Anderson, 45 A. 1134; Bank vs. Dixey, 21 A. 23; Dodd vs. Crain, 6 R. 60; Lapine vs. Lapine, 32 A. 52; Mathe vs. McCrystal, 11 A. 4; Montijo vs. Gordy, 33 A. 1115.

(b) Proceedings subsequent to fiat not involved or considered.

Roman vs. Denny, 17 A. 127; Bank vs. Dixon, 21 A. 52, 53; Hoar vs. Clancy, 26 A. 537; Levee Commissioners vs. Marks, 16 A. 112.

2. Delay for appeal runs from notice.

Billet vs. Henry, 2 A. 145; Lombas vs. Robichaux, 14 A. 105.

3. Rights of mortgage creditor against surety on appeal bond.

See Landry vs. Victor, 30 A. 1041.

(K) Executory process against third possessor of property:

Process allowed where pact *de non* exists.

Stevens vs. Pinneo, 26 A. 618; Lee vs. Packard, 25 A. 37, see "Hypothecary Action," *ante*.

(L) Writ of seizure does not expire in seventy days, as in case of *fi. fa.* It has no return day.

Taylor vs. Graham, 18 A. 656; State vs. Judge, 20 A. 523; Monition of Hall, 21 A. 693; Surgt vs. Colmer, 22 A. 23; Stackhouse vs. Zuntz, 41 A. 415; Mc-holland vs. Scott, 33 A. 1045.

(M) Who executes writ:

Ordinarily the sheriff; but in special cases other officers designated by law may execute—e. g., tax collector of levee taxes under Act of 1859.

Levee Commissioners vs. Marks, 16 A. 112; White vs. Wian, 15 A. 222.

- (N) *No alias writ necessary where original is unduly and prematurely returned.*

Stackhouse vs. Zuntz, 41 A. 415.

- (O) *Executory process may issue where only one instalment of debt is due.*

Penouilh vs. Abraham, 44 A. 188; C. P. 686.

And if other instalments mature pending injunction, whole sale may be made for cash.

Dwight vs. Richard, 5 A. 885; McClelland vs. Bideman, 5 A. 563; McCool vs. Fluker, 12 A. 551.

- (P) *Order of seizure may be signed before filing of petition:*

Learned vs. Walton, 41 A. 284; Bloom vs. Martin, 20 A. 256; Nash vs. Johnson, 9 R. 11.

Court may issue order in chambers, without special legal authority.

Folger vs. Roos, 40 A. 602; Russ vs. Faust, 15 A. 477.

- (Q) *Sequestration ancillary to executory process:*

Writ properly issues to hold immovables by destination removed by mortgagor.

Learned vs. Walton, 42 A. 455; Duncan vs. Wise, 88 A. 75; Mortgage Company vs. Ralston, 88 A. 598.

- (R) *Holder of subsequently maturing note need not prove that prior ones have been paid.*

Armon vs. Downes, 2 A. 242; Ledoux vs. Jamieson, 18 A. 132.

- (S) *Terms of mortgage measure creditor's right. He can not go beyond it.*

Easterling vs. Thompson, 19 A. 84; Pele vs. Meaux, 17 A. 53.

- (T) *Rights of mortgagees when property is in hands of executor or administrator:*

1. He may rule succession representative to sell.

C. P. 990, 991, 992; Vincent vs. D'Aubigne, 19 A. 529; Mason vs. Williams, 12 A. 68.

2. Succession representative may initiate sale, under C. P. 990.

Succession of Hood, 83 A. 470.

- (U) *Rights of mortgage creditor when property in hands of third person:*

1. He may proceed by hypothecary action.

Montijo vs. Gordy, 88 A. 1113.

2. He may seize directly, if his act contain the *pact de non*.

Avegno vs. Schmidt & Ziegler, 85 A. 535; Taylor vs. Pipes, 24 A. 553.

(V) Order of seizure and sale is not a judgment:

It bears no resemblance to a judgment save in its quality of appealability.

Mitchell vs. Logan, 24 A. 1008; *State ex rel. Wise vs. Taylor*, 22 A. 971; *Rousseau vs. Bourgeois*, 28 A. 198; *Riley vs. Christie*, 18 A. 286; *Harvard vs. Voorhies*, 16 L. 264.

(W) Differences between judgment and order of seizure and sale. Executory process lacks following elements of judgment:

1. It is not preceded by citation and service of petition, but mere notice.

Hart & Hebert vs. Pike, 29 A. 863; *Heroman vs. La. Inst. of Deaf and Dumb*, 85 A. 810; *Williamson vs. Richardson*, 30 A. 1169; *Dupuy vs. Bemiss*, 2 A. 509; *Broughton vs. King*, 2 A. 569; *Folger vs. Roos*, 8 A. 802; *Banking Co. vs. Walden*, 15 L. 484.

2. It creates no issue.

Humphreys vs. Brown, 19 A. 159.

3. It requires no answer on default. It is not a suit.

Rousseau vs. Bourgeois, 28 A. 187; 2 A. 268; 2 A. 145; 2 R. 8; *Folger vs. Roos*, 40 A. 604.

4. It adjudicates to plaintiff no right not secured by notarial act.

5. It can not on its inscription in mortgage office operate a judicial mortgage.

6. It does not operate *in personam* but only *in rem*.

7. It can not support plea of *res judicata*.

Humphreys vs. Brown, 19 A. 159.

8. No reasons need be given in support.

Garrish vs. Hyman, 29 A. 28.

9. No previous amicable demand required.

Eenshaw vs. Richards, 30 A. 598; *Roman vs. Denney*, 17 A. 126; *Poey vs. Bank*, 5 A. 183; *Ripka vs. Pope*, 5 A. 61; *McCalop vs. Flucker*, 12 A. 551.

(X) Part holders of same mortgage:

Where mortgagee transfers to different persons portions of mortgage debt, they all share equally, in proportion.

Adams vs. Lear, 5 A. 145; 1 R. 224; 16 L. 225.

733. Confession of Judgment—When—An act is said to import a confession of judgment in matters of privilege and mortgage, when it is passed before a notary public, or other officer fulfilling the same functions, in the pres-

ence of two witnesses, and the debtor has declared or acknowledged the debt for which he gives the privilege or mortgage.

1. When act imports confession of judgment.
Dejean vs. Hebert, 31 A. 729.
2. Where act does not import confession of judgment, executory process does not issue.
Courtney vs. Andrews, 10 R. 180.
3. What is an "authentic act."
Faulk vs. Pinnell, 6 R. 23; Gorton vs. Gorton, 7 L. 478.

734. Rights of Mortgage Creditor—When the creditor is in possession of such an act, he may proceed against the debtor or his heirs, by causing the property subject to the privilege or mortgage to be seized and sold, on a simple petition, and without a previous citation of the debtor, in the manner laid down in the third paragraph, second section, third chapter of the first part of this Code.

C. P. 43, 61 to 68, 74, 163, 206, 735.

1. Extent of liability of heirs. They are not responsible beyond assets of their author, where they accept under benefit of inventory.
Citizens' Bank vs. Hyams, 42 A. 734.
2. Citizens' Bank not required to proceed under hypothecary action to recover stock subscription secured by mortgage.
Citizens' Bank vs. Hyams, 42 A. 734.
3. Necessary parties where mortgage bears on community property. Heirs of wife not necessary parties in executory process vs. husband to enforce mortgage on community property.

Landreaux vs. Louque, 43 A. 234; Hawley vs. Bank, 26 A. 230; Randolph vs. Chapman, 21 A. 496; Bicker vs. Pearson, 26 A. 691; Rusk vs. Warren & Co., 25 A. 814; Riley vs. Condran, 26 A. 294; Phelan vs. Ax, 25 A. 879; Killelea vs. Barrett, 37 A. 865; Brown vs. Jacobs, 24 A. 530; Sadler vs. Kimbrough, 24 A. 534.

Nor are co-mortgagees, holding separate notes, necessary parties.

Soniat vs. Miles, 32 A. 164.

735. Three Days' Notice—In obtaining this order of seizure, it shall suffice to give three days' notice to the debtor, counting from that on which the notice is given, if he resides on the spot, adding a day for every twenty miles between the place of his residence and the residence of the judge to whom the petition has been presented.

C. P. 168, 784.

Notice. To whom given:

It may be given:

1. To debtors' assignee in bankruptcy.
Dobel vs. Delavaliade, 80 A. 604.
2. To tutrix.
Banker vs. Durand, 25 A. 518.
But only when she has qualified.
Heroman vs. Institute, 84 A. 810.
3. To executor of deceased and to surviving husband.
Poutz vs. Bistes, 15 A. 636; Andrews vs. Bank, 5 A. 788.
4. To legal heirs.
Killelea vs. Barrett, 87 A. 863; Nicholls vs. Grice, 6 A. 446; Gillaspie vs. Bank, 80 A. 1815; McCalop vs. Fluker, 12 A. 551; Dupuy vs. Bemis, 1 A. 509.
5. To tutor *ad hoc* or curator *ad hoc* in absence of regular tutor.
Keenan vs. Ahern, 84 A. 866; Monition of Hall, 31 A. 692; Taylor vs. Graham, 18 A. 656.
6. Notice absolutely essential and must precede seizure.
Birch vs. Bates, 22 A. 199; Billgery vs. Ferguson, 80 A. 84; Broughton vs. King, 2 A. 569; McDonogh vs. Fort, 1 R. 295; Andrews vs. Bank, 1 A. 787; Surgi vs. Colmer, 22 A. 22; 5 A. 787.
7. Want of notice cured by prescription of five years.
Allan vs. Couret, 24 A. 24; Chase vs. Gas Light Co., 45 A. 300.
8. Notice must be signed and issued by clerk, not sheriff.
Hart & Hebert vs. Pike, Brother & Co., 29 A. 262; Billgery vs. Ferguson, 80 A. 86; Nash vs. Johnson, 9 R. 12; 7 N. S. 514; Gallagher vs. Congregation, 35 A. 829; Chase vs. Gas Light Co., 45 A. 300.
9. Service of notice by minor deputy sheriff valid.
Williamson vs. Richardson, 81 A. 685.
10. Issuance by sheriff instead of clerk not cause of nullity.
Succession of Sadler vs. Henderson, 85 A. 826; Chase vs. Gas Light Company, 45 A. 305; Billgery vs. Ferguson, 80 A. 85; Hart & Hebert vs. Pike et al., 29 A. 262.

11. Such objection must be made before sale.

Jouet vs. Mortimer, 29 A. 206; *Chase vs. Gas Light Company*, 45 A. 305.

12. Notice may be waived.

LeBlanc vs. Dubroca, 6 A. 362; *McDonogh vs. Garland*, 7 A. 143; *Mullen vs. Harding*, 12 A. 271; *Broadwell vs. Rodriguez*, 18 A. 78; *Hewett vs. Stephens*, 5 A. 640; *Lewis vs. Gordy*, 5 A. 570.

13. Effect of notice:

(a) Notice and seizure interrupt prescription.

Hebert vs. Chastant, 23 A. 152; *Walker vs. Lee*, 20 A. 192; *Cloutier vs. Lemee*, 38 A. 309; *Dixon vs. Irwin*, 28 A. 427; *Roubien vs. Champlin*, 28 A. 215; *Mann & Co. vs. Norton*, 21 A. 155; *Stanbrough vs. McCall*, 4 A. 322; *Dumonchel vs. Limerick*, 21 A. 32; *Fortier vs. Zimble*, 6 A. 54.

(b) Interruption of prescription applies to personal action subsequently instituted.

Rhea vs. Taylor, 8 A. 53; *Walker vs. Lee*, 20 A. 192; *Fortier vs. Zimble*, 6 A. 54.

(c) There is, however, no interruption of prescription:

(a1) Where notice is given after prescription has run.

Mann & Co. vs. Norton, 21 A. 155; 20 A. 192.

(b1) Where there was no notice to curator *ad hoc* but mere acceptance by him of appointment.

Roubien vs. Champlin, 28 A. 215; *Jacobs vs. Calderwood*, 4 A. 509.

736. What Judge Issues Writ.—The judge within whose jurisdiction is situated the property subject to the privilege or mortgage, has the power to issue this order of seizure and sale, although the debtor resides out of his jurisdiction; and, in this case, the clerk of the court issuing the order shall direct to the sheriff of the parish where the debtor resides a written notice to be given to him, and it shall be the duty of the said sheriff to serve the notice, and return the original with his report in the same manner as in ordinary citations.

C. P. 163.

1. *What judge issues writ.* Judge within whose jurisdiction property is situated.

Scott, Williams & Co. vs. Turner, 15 A. 246; *Municipality vs. Garland*, 11 R. 387; see Act 1876, p. 106.

But judge of debtor's domicile may issue writ.

Roman vs. Denney, 17 A. 126; Genereux vs. Simon, 21 A. 632; 2 N. s. 574; 4 L. 240; 3 A. 637; 15 A. 346.

2. Delay must be given that debtor may appeal if he desire.
Surgl vs. Colmer, 22 A. 22; McDonogh vs. Fort, 1 R. 235; Andrews vs. Bank, 5 A. 737; Rhea vs. Taylor, 8 A. 23.

3. Where judge is without jurisdiction, order absolutely null and void.

Morton vs. Reynolds, 4 R. 26; McCloskey vs. Webb, 4 R. 201; Robert vs. Brown, 14 A. 598; Burns vs. Van Loan, 29 A. 563.

737. When Debtor Absent—Attorney Appointed—If the debtor who has granted the privilege or mortgage is absent, and not represented in the State, the judge, at the request of the plaintiff, shall appoint him an attorney, to whom notice of the demand shall be given in the manner above directed, and contrarily with whom the seizure and sale shall be prosecuted.

C. P. 116, 748, 749.

1. Authentic evidence of absence of debtor not required.

Frost vs. McLeod, 19 A. 80.

2. Notice of demand means legal notice, served upon authorized person.

State vs. Judge, 16 A. 391.

3. Person appointed must be attorney and it matters not if he be styled curator *ad hoc*.

Dixey vs. Erwin, 23 A. 427.

And Supreme Court judicially notices who are attorneys.

Monition of Hall, 21 A. 698.

4. Curator *ad hoc* may appeal.

Langley and Kinhead vs. Burrows, 15 A. 392; Bach vs. Ballard 13 A. 631; 12 R. 457.

738. Injunction—The debtor, against whom this order of seizure shall have been rendered, may obtain an injunction to suspend the sale, if before the time of sale he files in the court issuing the order his opposition in writing, alleging some of the reasons contained in the following article and of which he shall swear to the truth.

1. Suspension of seizure and sale. Seizure and sale suspended only—

(a) By appeal from fiat of judge.

(b) By injunction, with or without bond.

Minot vs. Bank, 4 R. 490; Clements vs. Oakey, 2 R. 91.

2. Unsworn opposition to executory process, not coupled with injunction, is ineffective.

Zuntz vs. Cornen, 10 A. 433; Calhoun vs. Bank, 30 A. 781.

3. Effect of injunction:

(a) It does not release seizure.

State ex rel. Gay vs. Judge, 27 A. 212; Lamorere vs. Cox, 32 A. 246.

(b) Nor quash order for such seizure.

Stackhouse vs. Zuntz, 41 A. 415.

4. What court issues injunction:

(a) Ordinarily only court issuing the order of seizure.

Dufossat vs. Berens, 18 A. 339.

(b) But in executions of ordinary judgments, other courts in other parishes may enjoin execution when levied within their jurisdictions.

Lawes vs. Chinn, 4 N. B. 390; Donnell vs. Parrot, 13 A. 258; Coleman vs. Brown, 16 A. 110; Hobgood vs. Brown, 2 A. 323; Copeley vs. Edwards, 5 A. 644; Police Jury vs. Mitchell, 4 A. 84.

5. Oath. Sufficient when plaintiff swears that "facts and allegations set forth are true."

Lewis vs. Winston, Morrison & Co., 26 A. 707; Zuntz vs. Cornen, 10 A. 433; Beatty vs. Dufief, 10 A. 268.

6. Who may not enjoin:

Lessee, because adjudicatee may not disturb him.

Carroll vs. Chaffe, 35 A. 83.

739. Injunction—The debtor can only arrest the sale of the thing thus seized, by alleging some of the following reasons, to-wit:

1. **Payment**—That he has paid the debt for which he is sued;

2. **Remission**—That he has been remitted by the creditor;

3. **Transaction, Novation, etc.**—That it has been extinguished by transaction, novation, or some other legal manner;

4. **Extension of Time**—That time has been granted to him for paying the debt, although this circumstance be not mentioned in the contract;

5. **Forgery of Act**—That the act containing the privilege or mortgage is forged;

6. **Fraud, Violence, Fear or Unlawful Means**—That it was obtained by fraud, violence, fear, or some other unlawful means;

7. **Compensation**—That he has a liquidated account to plead in compensation to the debt claimed;

8. **Prescription**—And finally, that the action for the recovery of the debt is barred by prescription.

Q. P. 298, 346, 748.

1. Injunction issues as of right when *prima facie* case presented.

Newman vs. Frevin, 42 A. 721; Corfien vs. Zuntz, 14 A. 861.

And is sole mode of arresting sale except suspensive appeal. Rule to show cause does not arrest sale.

Clement vs. Oakley, 2 R. 91; Minot vs. Bank, 4 R. 490.

2. *Grounds for injunction without bond:*

Par. 8. That debt has been extinguished by transaction, novation, or some other legal manner. But charge that obligation sued on was null and without consideration *ab initio* can not be sustained under this paragraph.

Hodgeon vs. Roth, 33 A. 944; Vail vs. Moll, 57 A. 208.

Par. 4. That time was granted to pay the debt.

Penouilh vs. Abraham, 42 A. 327.

- (a) But where time is alleged to have been granted before date of act or note, no evidence is admissible except on allegation of error or fraud.

Tenney vs. Abraham, 48 A. 240; Ralston vs. Mortgage Company, 33 A. 598; Vail vs. Moll, 57 A. 208; Marsh vs. Foster, 11 A. 182.

- (b) Evidence of extension of time must be clear and positive.

People's Bank vs. Ballowe, 34 A. 566.

Par. 5. That signature to mortgage act is forged. Burden of proof is on plaintiff to prove genuineness.

James vs. Rand, 48 A. 182.

Para 8. That action is barred by prescription, C. P. 732 (P.)

Berens vs. Boutte, 81 A. 116; *Williamson vs. Richardson*, 80 A. 116.

3. When order enjoined without bond on any of above grounds, no evidence of any other grounds can be given, even if alleged.

Williamson vs. Richardson, 80 A. 116; *Gillaspie vs. Scott*, 32 A. 770; *Stockett vs. Johnson*, 22 A. 89; *Landry vs. Leglise*, 3 L. 224.

4. Bond and security must be given where other grounds are alleged or relied on than grounds specified.

Berens vs. Boutte, 81 A. 112; *Lamore vs. Succession of Cox*, 32 A. 246.

And when injunction was issued by clerk under Act of 1855, bond and security were required to be given in all cases.

Witowski vs. Selby, 15 A. 328.

5. Supreme Court notices grounds not alleged when they appear of record.

Chambliss vs. Atchison, 2 A. 498.

740. No Bond Required—When the judge grants an injunction, on the allegation under oath of any of the reasons mentioned in the preceding article, he shall require no surety from the defendant, but he shall pronounce summarily on the merits of his opposition if the plaintiff requires it, as is explained below.

C. P. 750.

In *Dupre, Administrator, vs. Anderson*, 45 A. 1184, it is decided that the "debtor" can enjoin only on grounds stated in Art. 739.

741. Motion to Dissolve—Summary—The plaintiff against whom the injunction has been obtained, may compel the defendant to prove, in a summary manner, before the judge, the truth of the facts alleged in his opposition.

C. P. 756; *Penouilh vs. Abraham*, 42 A. 327.

1. Summary opposition triable without jury.

Amacker vs. Smith, Harris & Co., 16 A. 361.

2. Where security must be given, jury may be asked for and ordered.

Cummings vs. Police Jury, 5 A. 684.

742. Revocation of Order of Sale—If, on being thus required, the defendant proves that the action on which the seizure has been obtained is extinct or prescribed, or that the cause of it is void, or that the debt on which it is founded is paid, remitted, or compensated, the judge shall revoke the order of seizure, and condemn the plaintiff to pay costs.

See *Calloun vs. Bank*, 80 A. 173.

Injunction of seizure not perpetuated when a mortgage debt is really due and seizure is merely excessive in amount.

Murphy vs. Maskell, 2 A. 768.

743. Dissolution of Injunction—But if the defendant does not prove the truth of the facts alleged in his opposition, or if it appears that he has paid or can plead in compensation for only a part of the debt, the judge shall dissolve the injunction he had granted, and the sale of the property shall proceed, either for the whole debt or for a part, as the case may be.

(A) Dissolution of injunction:

See *ante* "Injunction."

1. Damages resulting from dissolution of injunction recoverable only by special action, and on the bond when one was given.

Gillaspie vs. Scott, 83 A. 778; 80 A. 816; *Methodist Church vs. Sheriff*, 83 A. 1461; *Dejean vs. Hebert*, 81 A. 739; *Thompson vs. Lemelle*, 83 A. 982; *Testart vs. Belot*, 83 A. 1469; *Hodgson vs. Roth*, 83 A. 941; *Burgess vs. Gordy*, 82 A. 1296; *Ricard vs. Harrison*, 19 A. 162; *Dashiel vs. Lessasser*, 15 L. 101.

2. And only specially alleged damages recoverable, not punitive damages provided in C. P. 304.

Meaux vs. Pittman, 85 A. 361.

(B) Items of damages:

Attorney's fees.

Fargoud vs. Morgan, 2 L. 102; *Ricard vs. Hiriart*, 5 L. 246; *Hereford vs. Babin*, 14 A. 333; *Brown vs. Lambeth*, 2 A. 822; *McRae vs. Brown*, 2 A. 181; *Meaux vs. Pittman*, 85 A. 362.

744. Proceeding Against Third Possessors—The ex-

ecutory process in the matter of privilege and mortgage, may be pursued, not only against the debtor, or his heirs, but also against the third possessor of the thing subjected to it, according to the forms prescribed in the third paragraph, second section, third chapter of the first part of this Code.

C. P. 61, 68, 69.

(A) Proceedings against third possessor :

1. When act of mortgage does not contain *pact de non alienando*, mortgage creditor must proceed against third possessor by regular hypothecary action after thirty days' demand and ten days' notice.

Montijo vs. Gordy et als. 33 A. 1113; Waddell vs. Payne & Harrison, 22 A. 184; Taylor vs. Pipes, 24 A. 261; 4 A. 270; 8 A. 227.

(B) Hypothecary is real action :

Hypothecary action is real action, and follows property.

Boguille vs. Faillie, 1 A. 204.

745. Appraisements—Delays—Formalities—When the sheriff sells property which he has seized conformably to the provisions contained in this chapter, he must cause the same appraisements to be made, and observe the same delays and formalities as are prescribed for the sale of property seized in execution.

C. P. 654, 664, 670.

1. What is included in seizure:

Immovables by destination, mules, wagons and implements of agriculture, when plantation is seized.

Succession of Dougherty, 52 A. 412; Williamson vs. Richardson, 81 A. 685.

2. Appraisement:

Appraisement by widow, not agent of deceased husband nor representative of his succession, is invalid in executory process against husband.

Germaine vs. Mallerich, 81 A. 871.

3. Waiver of appraisement:

Debtor may waive, as by refusing to appoint appraisers.

Ins. Co. vs. Bagley 19 A. 89; Jouet vs. Mortimer, 29 A. 210; Broadwell vs. Rodriguez, 18 A. 68; Martin vs. Lake, 87 A. 768; Soniat vs. Miles, 82 A. 164; Weber vs. Gorsuch, 24 A. 615; Desplattes vs. St. Martin, 17 A. 91.

Or by clause of express waiver in act of mortgage.

Learned vs. Walton, 42 A. 455.

4. Tutor mortgaging for minor with advice of family meeting may waive appraisement.

Martin vs. Lake, 37 A. 763.

5. Adjudication for less than appraisement prescribed in five years.

Herrman vs. Fontelleu, 29 A. 505; *Succession of Hood*, 33 A. 466; *Mulholland vs. Scott*, 33 A. 1043; *Allen vs. Couret*, 24 A. 24; *Frazer vs. Zylics*, 29 A. 534.

6. Cultivation of plantation seized. Plaintiff may require sheriff to cultivate pending seizure.

Learned vs. Wilson, 42 A. 455.

7. Creditor by mortgage may seize only portion of property mortgaged.

Mitchell vs. Logan, 34 A. 1001; *Burgess vs. Gordy*, 32 A. 1297; *Powell vs. Hayes*, 31 A. 789.

8. Creditor may seize entire mortgaged property.

Morris vs. Womble, 30 A. 1312; *Lambeth vs. Sentell*, 33 A. 691; *Pepper vs. Dunlap*, 17 L. 163; 10 R. 472; 10 A. 725; 18 A. 659; but see *Richard vs. Michinard*, 33 A. 381.

9. But, unless his claim has ripened into personal judgment, he can seize only mortgaged property.

Bienvenu vs. Insurance Company, 33 A. 219.

10. Notice of sale need only be published three times in thirty days.

Jouet vs. Mortimer, 29 A. 204.

11. Time and place of sale.

C. P. 664.

12. Advertisement.

C. P. 663.

13. No parole evidence receivable to contradict advertisement and process verbal.

Lewis vs. Labauve, 18 A. 332.

14. Bonding of property seized under executory process. Such bonding is permitted.

State ex rel. Roth vs. Judge, 37 A. 343.

15. Return on writ. Uncontradicted return makes full proof.

Roberts vs. Zanzler, 34 A. 205.

16. Writ not returnable in seventy days.

Monition of Hall, 21 A. 633; *Taylor vs. Graham*, 18 A. 653.

746. Executory Process on Judgments—When a cred-

itor has obtained against his debtor a judgment having the force of *res judicata*, in a tribunal of this State different from that in which he seeks the execution, he may, on this ground, proceed by executory process, and cause to be seized and sold the property of his debtor, without previous citation, in the same manner as on privileged or mortgaged debts contained in acts importing confession of judgment.

C. P. 285, 539, 617, 732.

1. Executory process issues on a judgment rendered by a tribunal of this State different from one in which execution is sought.

Montijo vs. Gordy, 33 A. 1116; Canal Bank vs. Copeland, 12 L. 24.

But a *feri facias* is necessary to execute judgment for money rendered by court within same jurisdictional limits.

Conflict between C. P. 746 and 732 (2); see Canal Bank vs. Copeland, 12 L. 24.

2. Previous to 1846 creditor by foreign judgment could proceed *via executiva*.

Ward vs. Bank of Mississippi, 3 A. 450; Bank of Tennessee vs. McKee, 2 A. 461; Newell vs. Morton, 3 R. 103; Miller vs. Gaskins, 3 R. 94; Killgore vs. Bank of Mississippi, 3 A. 693; Scott vs. Duke, 3 A. 253; Commercial Bank vs. Markham, 3 A. 696; Featherstone vs. Compton, 3 A. 285.

3. But such law was abolished in 1846 and the right no longer exists.

Turley vs. Dreyfus, 33 A. 337; Turley vs. Dreyfus, 35 A. 510.

4. But an ordinary action on such judgment is still allowed. The judgment is not conclusive of what it decrees, but is open to all defences which can be legally opposed to judgments.

Turley vs. Dreyfus, 33 A. 337; Pillet vs. Edgar, 4 R. 274; Simmons vs. Howard et als., 23 A. 504.

5. Judgment always receivable to prove *rem ipsam*.

Succession of Lampton, 35 A. 421.

6. In action on judgment of different tribunal, what is necessary to be produced:

(a) Whole record, in order to show that judgment is conclusive and how far conclusive.

McLaren vs. Kehler, 28 A. 80; Hookaday vs. Skeggs, 19 A. 632.

- (b) Appeal transcript is proper record when case was taken up on appeal.

McLaren & Co. vs. Kehler, 23 A. 80.

- (c) Return of execution, to show how far judgment has been satisfied.

Ward vs. Bank of Mississippi, 3 A. 450; Bank of Tenn. vs. McFee, 2 A. 461; Newell vs. Morton, 3 R. 102.

7. What record must contain :

- (a) Certificate from chief justice or presiding magistrate declaring that the attestation of clerk was in due form Signature of governor and great seal of State not sufficient.

Goodman vs. James, 3 R. 297.

- (b) The judgment—but not necessarily the reasons therefor.

R. R. Co. vs. Thornton, 12 A. 736.

- (c) Citation or appearance of defendant.

McNairy vs. Bell, 5 R. 418; Warren vs. Hall's Executor, 10 L. 371; Rowand vs. Jarvis, 5 A. 48; Lewis vs. Wilden, 4 A. 574; 2 N. S. 300; Patterson vs. Mayfield's Curator, 10 L. 220.

8. Want of citation must be specially alleged and proved.

Graddon vs. Justus, 24 A. 222.

And when proved, it strikes judgment with nullity.

Morris vs. Bailey, 15 A. 2.

747. On Judgment by Default or Attachment—If the judgment of which the creditor is in possession, shall appear to have been rendered by default, or on attachment, the creditor may, nevertheless, proceed by the executory process.

748. Injunction of Process on Judgment—Grounds—The defendant, against whom an order of seizure has been obtained, by virtue of a judgment, as stated above, may obtain an injunction to stop the sale of the property seized, if he alleges under oath in his opposition that the judgment has not acquired the force of *res judicata*, because he has appealed from it, or because it is void by the law of the place where it was rendered.

C. P. 298, 304, 789, 749, 750.

Execution of judgment will be enjoined when judgment purports to have been rendered on confession through attorney, where transcript has suspicious appearance and defendant's denial of authority of attorney to confess judgment has not been disproved.

Dunlap vs. Hundly, 2 A. 212.

749. Causes for Injunction—The defendant may also obtain an injunction, on alleging, under oath, any of the causes which prevent the sale of property mortgaged or otherwise bound by virtue of an act importing a confession of judgment.

C. P. 296, 304, 739.

(A) What causes are not valid grounds for injunction :

1. That description of property is insufficient.

Henderson vs. Hoy, 26 A. 156.

2. That seizure is excessive; whole mortgage secures whole debt.

Heffner vs. Hess, 29 A. 149.

3. That sufficient evidence was not adduced to authorize fiat. Remedy is by appeal.

Latiolais vs. Citizens' Bank, 33 A. 1453; City of Shreveport vs. Flournoy, 26 A. 709; Naughton vs. Dinkgrave, 25 A. 538; 20 A. 256; 14 A. 656; 12 A. 111; 6 R. 58; 25 A. 80; 8 A. 23; Dupre vs. Anderson, 45 A. 1134.

(B) What causes are valid grounds for injunction :

That writ issues for greater sum than is lawfully due.

Fortier vs. Burthe, 19 A. 510.

750. Bond Required—When—But in the cases mentioned in the two preceding articles, the judge shall not grant an injunction without requiring that the defendant shall give bonds to the plaintiff, with good security, to the amount for one-half more than the appraised value of the property seized if it consist of movables, or in such sum as the judge shall fix, if the property be immovable, conditioned

to pay damages as the plaintiff may suffer should the injunction be dissolved.

C. P. 804, 740.

751. Summary Hearing of Injunction—The opposition on which the injunction was granted shall be pronounced on summarily, as in the case of a public act bearing a privilege or mortgage.

752. Effect of Judgments Rendered in Other States—Judgments rendered in the different courts of the United States, shall import full proof in the courts of this State, if the copy of them which is offered be certified by the clerk of the court in which they are rendered, be sealed with his seal, if there be one, and clothed with the certificate of the judge, chief justice or magistrate who presides in the court, as the case may be, declaring that the attestation is made in due form.

Judgments rendered in other States.

1. This article recognizes Federal constitutional mandate in Art. 4, Sec. 1, that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

Graydon vs. Justus, 24 A. 222.

2. Judgment of other State always open to investigation as to jurisdiction of court to render it.

Thompson vs. Whitman, 18 Wall. 457; D'Arcy vs. Ketchum, 11 How. 174.

3. It may be contradicted as to jurisdictional recitals, as to subject matter or the person, or, in proceedings *in rem*, as to thing.

Thompson vs. Whitman, 18 Wall. 457; Board of Public Works vs. Columbia College, 17 Wall. 521.

753. Copies Evidence—When—When the judgments have been rendered in foreign countries, the copies presented shall be considered authentic, and admitted in evi-

dence in the tribunals of this State, if they are clothed with all the forms required to prove their authenticity in the countries where they are pronounced.

C. P. 456.

(A) *Foreign judgments frequently given effect by our courts.*

Brannahan vs. Tanner, 16 L. 484; Jones vs. Jamison, 15 A. 85; Rowand vs. Jarvis, 5 A. 48; R. R. Co. vs. Thornton, 12 A. 786; State ex rel. Plaisant vs. R. R. Co., 38 A. 818; Succession of Lorenz, 41 A. 1093.

(B) *Presumption in favor of foreign judgment:*

1. In absence of impeaching evidence, it is *res judicata* of matters it passes upon.

Lewis vs. Wilder, 4 A. 574; Rowand vs. Jarvis, 5 A. 48; Hazard vs. Bank, 11 R. 526.

2. But judgment may be resisted on pleas of payment, prescription, etc.

McElmoyle vs. Cohen, 18 Peters, 212; Hampton vs. McConnell, 8 Wheat, 234.

3. It is presumed that evidence in record was properly received.

Jordan vs. Black, 1 R. 575.

4. It is only necessary to show proper authentication of record.

Simmons et al. vs. Howard, Preston & Barrett, 28 A. 504.

5. Transcript proves only *rem ipsam*, and is open to impeaching evidence.

Succession of Lampton, 35 A. 420; Remy vs. Municipality, 8 A. 47; but as to conclusiveness of judgment, see Jones vs. Jamison, 15 A. 85; Davis vs. Dugas, 11 A. 118.

6. Matters which were not before other court which rendered the judgment do not enter therein and have no force here.

Glass vs. Wheelers, 24 A. 397.

(C) *Authentication of foreign record:*

1. Record must be authenticated by certificate of chief justice or presiding magistrate that attestation of clerk is in due form. Certificate of Governor under great seal not sufficient.

Desty's Federal Procedure, § 906; Leggo vs. Canal Co., 8 A. 138; Goodman vs. James, 8 R. 297; State vs. Brown, 33 A. 1151; Campbell, Ritchie & Co. vs. Karr, 7 L. 70; 12 L. 70; Smith's Heirs vs. Blount, 10 L. 483; Ward's Heirs vs. Bowmar, 12 L. 572; Dickson vs. Grisson, 4 A. 538.

2. Where judge acts as clerk, his attestation is sufficient.

Pagett vs. Curtis, 15 A. 451.

CHAPTER IX.

OF SUMMARY PROCESS.

754. Summary Process—The summary process is to be used in every case where it is expressly prescribed by law.

C. P. 98, 955, 961, 1031.

1. Grant of summary jurisdiction must appear in title of act, else it will be unconstitutional as to that feature.

Succession of Patrick Irwin, 83 A. 63, 68; Duverges vs. Salter, 5 A. 24; State vs. Church Wardens, 3 A. 720.

2. *Summary remedy against corporations contracting with municipal corporations.*

By Act 133 of 1888 a summary remedy is provided against corporations to compel compliance with contracts with municipal corporations:

Section 1. That in all cases where any corporation has heretofore contracted with, or may hereafter contract with, or shall be otherwise legally bound to any parish or municipal corporation in this State, with reference to the paving, grading, repairing, reconstructing or care of any street, highway, bridge, culvert, levee, canal, ditch or crossing, and shall fail or neglect to perform said contract or obligation, the said parish or municipal corporation, or any officer thereof, or any five taxpayers thereof, shall have the right to proceed by a writ of mandamus to compel the performance of said contract or obligation, or any part thereof, which writ of mandamus shall be made returnable in five days, shall be tried by preference over all other cases, without a jury, in vacation, as well as in term time, and in case of appeal shall be tried by preference in the appellate court.

Sec. 2. That in case any corporation shall fail or neglect to comply satisfactorily with any judgment against it in such a proceeding within the time therein fixed (which time shall be fixed by the court), it shall be the duty of the court, on contradictory motion and proof taken in the same case, to issue a writ of *distringas* against said company, and

to order the sheriff to do the work required to be done, and to apply the revenues and property of said company to defray the expenses incurred in executing the judgment of the court.

8. *Summary process against sureties on appeal bond:*

Act 45, E. S. 1870, Sec. 12, p. 101: "That in all cases of appeal to the Supreme Court, or other tribunals of this State, if the judgment appealed from be affirmed, the party in whose favor it is rendered may, on return of execution in the lower court that no property has been found, or not enough to satisfy the judgment and execution, after due demand on both parties, or their attorneys or legal representatives, obtain a decree against the surety on the appeal bond, or his legal representative, for the amount of the judgment or any unsatisfied balance thereof, on motion, after ten days' notice, which motion shall be tried, summarily and without the intervention of a jury, unless the surety or his legal representative shall allege, under oath, that the signature to the bond, purporting to be that of the surety, is not genuine, or that judgment has been satisfied."

4. Summary cases in Supreme Court:

R. S. 1915; Act 70 of 1872, p. 122; Act 78 of 1870.

5. Act 102 of 1873, p. 181, grants summary jurisdiction to district judges in the country to try at chambers, on application of district attorney after ten days' notice, rule upon any delinquent or defaulting tax collectors and their sureties.

See also Act 96 of 1877, p. 150, Sec. 70.

6. Act 25 of 1874. Certain suits in which provisional seizures have issued on application of laborer on farm or plantation for his wages shall be tried at request of either plaintiff or defendant, either in chambers or open court after three days' citation. Appeal returned in three days from signing of judgment.

7. Act 46 of 1880 gives sureties on official bonds right to secure release from their obligation as such when they fear incurring liability by malfeasance, misfeasance or neglect of official duties by causing principals to appear before court of competent jurisdiction on ten days' notice of the rule; and if apprehensions are justified, they shall be discharged and new sureties furnished.

8. *Consent to summary remedy.* Right to object to summary proceedings may be waived.

Lebœuf vs. Merle, 1 A. 144; *Fox vs. Tio*, 1 A. 334; *Tunnard vs. Hill*, 19 A. 247.

9. *Notice essential.* There must be notice of some kind though proceedings be summary. Without notice, proceedings are unconstitutional as not constituting "due process of law."

Mohr, Hanneman & Co. vs. Marks, 39 A. 578; *Haydel vs. Girod*, 19 Peters, 284; *Breedlove vs. Robinson*, 7 Peters, 484; *Slidell vs. Rightor*, 4 R. 59; *Carriere vs. Mayo*, 16 L. 126; 10 A. 764; 11 A. 575; *State ex rel. Morgan vs. Kennard*, 25 A. 251.

10. *Summary remedies constitutional, if notice be given.*

Murray's Lessee vs. Hoboken Land Co., 18 How. 772; *Railroad Co. vs. Robertson*, 34 A. 868.

11. *Trial at chambers.* Trial must be in open court unless right to try at chambers be expressly granted.

Love vs. Banks, 3 L. 481.

12. *Trial in vacation.* Court has no power to try in vacation unless law expressly permits.

Police Jury vs. Manning, 16 A. 182; *Baltimore & Ohio Telegraph Co. vs. R. E. Co.*, 39 A. 659; *Hernandez vs. James*, 23 A. 483; *Simonds & Co. vs. Leovy*, 21 A. 306.

13. *No previous default necessary.* Rule may be made absolute immediately.

State vs. McDonnell, 18 A. 232; *D'Autridge vs. Neto*, 7 M. 356; *Porter vs. Porter*, 5 R. 100; *Sturgias vs. Kendall*, 2 A. 565.

14. *Signature to judgment:* Judgment on rule requires no signature.

Fox vs. Tio, 1 A. 335; but see *Gallier vs. Garcia*, 2 R. 324.

755. Summary Trial—What Cases—Besides the cases specially directed by law, judgment shall be pronounced summarily:

1. **Incidental Questions—**On all incidental questions arising in the course of a civil trial;

2. **Motion for New Trial—**On all motions for new trial, and on declinatory exceptions (pleas to the jurisdiction);

3. **Motion to Homologate Reports of Experts, etc.—**On motions to homologate the reports of experts, accounts of

auditors, awards of arbitrators, nominations of syndics by creditors, and tableaux of distribution, as well as on the oppositions made to them;

4. **Opposition to Syndic's Account**—On disputes relative to the privileges of the creditors of a bankrupt, and the order in which they are to be paid.

C. P. 486.

(A) Strict construction:

Right to summary process strictly construed and must be expressly allowed.

Hernandez vs. Hugh, 22 A. 245; Thomas vs. Bourgeat, 6 R. 487; Copley vs. Conine, 8 A. 207; Baker vs. Doane, 8 A. 484; Fischel vs. Mercier, 82 A. 707; 14 A. 890; Nolan's Heirs vs. Taylor, 12 A. 201; Mussena vs. Ailing, 12 A. 799; Austin vs. Dunbar, 12 A. 182; Succession of Moore, 18 A. 512; Ledda vs. Maumus et al., 17 A. 817.

(B) Remedy by rule proper, where:

1. Judgment creditor seeks to cause erasure of apparent incumbrances on his debtor's property.

Morris vs. Cain's Executors, 84 A. 663; Dutrey vs. Laguens, 28 A. 753; New Orleans Canal Bank vs. Recorder, 27 A. 298; 15 A. 834; Beltram vs. Gauthreaux, 39 A. 106; Merrick vs. McCausland, 24 A. 256; Blair & Co. vs. Taylor et al., 35 A. 147; McNeill vs. Hauck, 24 A. 238; 2 A. 649; Roberts vs. Bauer et al., 35 A. 458; but see Morgan vs. Wintercast, 6 A. 485; 12 A. 182; and Bank of Louisiana vs. Delery, 2 A. 660; 24 A. 256.

And rule is not premature before sale and before holder of incumbrances sets up claim of preference on property or proceeds.

Buissiere vs. Williams, 37 A. 889.

2. Plaintiff in execution compels sheriff to comply with adjudication.

Blair & Co. vs. Taylor et al., 25 A. 146; Larthet vs. Hogan, 1 A. 830.

(a) And purchaser may rule sheriff to give him a deed.

12 A. 93; Blair & Co. vs. Taylor, 25 A. 145; Larthet vs. Hogan, 1 A. 830.

(b) And where creditor calls upon sheriff to pay over proceeds of sale, and debtor must be made a party.

Buckner vs. Gordy, 28 A. 619.

3. Co-heir after partition proceeds against mortgage creditors to have mortgages referred to proceeds and inscriptions erased from mortgage book.

Bayhi et al. vs. Bayhi et al., 35 A. 529.

Such mortgage creditors need not have been parties to original suit.

Bulsiere vs. Williams, 37 A. 389; Bayhi vs. Bayhi, 35 A. 529.

4. Matters to be adjusted arise incidentally in progress of suit.

Hernandez vs. Hugh, 22 A. 245.

Such as taxing of costs.

Decuir vs. Lejeune, 15 A. 216; State vs. Gauthreaux, 35 A. 1163.

5. Judgment creditor in proper cases calls police jury, sheriff and assessor into court to compel levy of tax to pay judgment.

Pease vs. Police Jury of Jefferson, 34 A. 187.

6. Creditor with liquidated claim calls upon administrator to sell on judicial order succession property to pay debt.

Dubuch vs. Wildermuth, 3 A. 408; Succession of Porter, 5 R. 98; Succession of Ogden, 10 R. 458.

7. Where writ of possession not consequence of judgment, it may be set aside on rule, but not where matter of defence is set up against writ itself.

Junck vs. Hozeau, 11 A. 752.

8. Creditor may proceed by rule to fix administrator's personal liability.

Castile vs. Chacere, 18 A. 561; Carriere vs. Mayo, 16 L. 126.

And also that of sheriff for failing to return *fi. fa.*

Taylor vs. Hancock, 19 A. 466.

9. Purchaser at judicial sale may proceed by rule to have adjudication set aside on account of defect of title.

Michoud vs. Dejoux, 8 A. 479.

10. Administrator or other representative of succession may rule adjudicatee to comply with bid and accept title.

Succession of Dupuy, 33 A. 279; Succession of Armat, 20 A. 340.

11. Where defendant becomes purchaser of a judgment against plaintiff after rendition of judgment against himself in favor of plaintiff, he may rule plaintiff to show cause why new trial should not be granted or judgment should not be declared extinguished.

Pattison vs. Edmonston, 4 A. 157.

12. Injunction having issued to remove obstructions from alley-way and the same continuing therein, defendant may be ruled to move instant.

McDonogh vs. Calloway, 7 R. 442.

13. Where attorney is proceeded against to compel him to refund money collected.

Butchers' Union vs. Crescent City Slaughterhouse Company, 41 A. 357; *Furner vs. Walsh*, 12 R. 233.

14. Where rescission is sought of *ex parte* order of sale of succession property.

Succession of Thompson, 42 A. 113.

15. Where defaulting tax collector and his sureties are sued for moneys collected but not accounted for.

Sec. 70 of Act April 20, 1877; R. S. 3303; *Police Jury vs. Brookshier*, 31 A. 733.

16. Where proceeding is to collect license.

McGuire, Tax Collector, vs. Vogh, 36 A. 312.

17. Where executor is required to produce bank book.

R. S. 1464; C. C. 1151; *Succession of Townsend*, 37 A. 405.

18. Where definitive syndic calls on provisional syndic to render account.

Wood vs. Creditors, 35 A. 257.

19. Where, in succession proceedings, corporation is called to show cause why stock should not be transferred on books.

Succession of Bouillemet, 39 A. 1045.

20. Where depositions are to be read in evidence.

Swift & Co. vs. Armstrong, 18 A. 189; *Baldehy & Lightner vs. Brackenridge*, 39 A. 660.

21. Where recusation of judge is sought. Rule on him proper.

State ex rel. Schwing vs. Fontelleu, 30 A. 1122.

22. Where subrogee moves to revoke an *ex parte* order rescinding subrogation.

Buck & Beauchamp vs. Blair, 34 A. 767.

(C) *Remedy by rule not proper, where:*

1. Purchaser at tax sale demands possession from former owner. Suit by petition and citation necessary.

Schoembs vs. Krieger, 33 A. 420; *Fischel vs. Mercier*, 32 A. 704.

2. Attempt made to annul judgment.

Ex parte Lefranc, 27 A. 606.

3. Action against sureties on sheriff's bond.

Hernandez vs. Hugh, 22 A. 245; *Soule vs. Worsham*, 22 A. 73.

4. Action is to compel third persons, pledgees of stock sold at sheriff's sale, to transfer such stock on books of company.

Weiser vs. Smith, 22 A. 156.

5. Action is petitory or is action in nullity.
National Bank vs. Raymond, 29 A. 335; Copley vs. Robertson, 6 A. 131;
City vs. Morris, 29 A. 241; King vs. Trigg, 24 A. 517.
6. Action is by administrator to recover property as belonging to succession.
Succession of Moore, 18 A. 512; 8 A. 11; Succession of McKinney, 3 A. 748; 3 A. 434; Brashear vs. Conner, 29 A. 349.
7. Action is against surety on sequestration bond; *aliter* as to attachment bond, arrest and appeal.
Sharp vs. Bright et al., 14 A. 590; Baker vs. Doane, 3 A. 434; Gale vs. Quick's Bail, 2 L. 348.
8. Action by sheriff or clerk against surety on bond for costs.
Mussina vs. Ailing, 12 A. 799.
9. Action for his fees by attorney appointed as tutor *ad litem* for minors.
Nolan's Heirs vs. Taylor, 12 A. 201.
10. Creditor of respited debtor contests judgment of another creditor and mortgage resulting from its inscription.
Austire, Sumner & Co. vs. Dunbar, 12 A. 182.
Rule proper when debtor has made forced or voluntary surrender.
Bank of Louisiana vs. Delery, 2 A. 650.
11. A judgment of separation from bed and board having been granted, judgment for divorce is sought. Divorce is not incidental to proceedings for separation.
Gernor vs. Hickey, 18 A. 454.
12. Where heirs take possession of succession, creditor can not by rule make them liable for ancestor's debts.
R. R. Co. vs. Bosworth, 8 A. 80.
Even where creditor holds judgment.
Reynolds vs. Horn, 4 A. 187.
13. Action discontinued can not be revived on rule.
Gilbert vs. Meriam, 2 A. 160.
14. Action against sheriff to make him responsible for illegal release of defendant, and failure to seize and sell property.
Dussin vs. Delaroderie, 5 R. 202.
15. Where action is brought against keeper of attached property to compel him to deliver the same to sheriff.
Meschew vs. Gould, 30 A. 163.
16. Where opposition to account has been filed.
Succession of Barbour, 17 A. 133.

17. Where validity of title claimed adversely to succession administered by curator.

Succession of Renneberg, 15 A. 661.

18. Where demand is made upon administrator to account.

Succession of Feltmeyer, 18 A. 153.

19. Where effort is made to set aside default.

City vs. Hall, 21 A. 438.

20. When effect is to annul judgments.

Succession of Lee, 28 A. 23.

21. When attempt is made to remove administrator.

Succession of Calhoun, 28 A. 823; 9 R. 350; 21 A. 561; 22 A. 94; 27 A. 686;
Succession of Guilbeau, 24 A. 474.

22. Where effort is made to compel Board of Liquidation to fund warrants. Remedy is by mandamus.

Oliver vs. Board of Liquidation, 40 A. 521.

23. Where possession of property is sought.

Succession of Townsend, 37 A. 115; Fischel vs. Mercier, 32 A. 704; Kirkland vs. Gas Co., 1 A. 299; Nimmo vs. Allen, 2 A. 451.

24. Where object is to arrest executory process.

Minot vs. Bank, 4 R. 490.

756. Summary Docket—The cases which are to be decided in a summary manner shall not be set down on the ordinary docket of suits, but are decided on days fixed for the purpose, and in a speedy manner, conformably to such special rules as each court may establish on the subject.

C. P. 130, 456, 741, 877, 878.

757. No Jury—Exceptions—These cases are decided without the intervention of a jury, except in cases in which the right to hold or exercise a public office or franchise is involved.

(A) A trial without jury constitutional.

State vs. Carro, 26 A. 877; Sauvinet vs. Walker, 27 A. 16; Sauvinet vs. Walker, 92 U. S. 90; Maurice vs. Martinez, 5 M. 436; Dobbs vs. Hempken, 3 R. 126; State ex rel. Morgan vs. Kennard, 25 A. 240; City Bank vs. Banks et al., 1 A. 412.

(B) In exceptional cases, jury is allowed—e. g. :

1. Where plaintiff asks judgment against garnishee on alleged false and evasive answers.

Denouveau vs. McNight, 26 A. 74.

2. And prior to Act 45, E. S. 1870, Sec. 12, p. 101, surety on appeal bond was entitled to jury.

Holmes vs. Dunn, 18 A. 153; Gale vs. Quick's Bail, 2 L. 348; Lebarre vs. Fry's Bail, 9 M. 881.

(C) Summary remedy without jury proper :

1. In suit for taxes.

New Orleans vs. Cassidy, 27 A. 704; 19 A. 82.

2. In opposition to *proces verbal* of deliberations of creditors of insolvent succession.

Guion, Administrator, vs. Creditors of Guion, 19 A. 81.

3. When plea to jurisdiction made.

McGehee vs. Browne, 3 A. 372.

4. In proceedings against attorneys at law and counsellors who refuse to pay over money collected by them for clients.

West's Syndic vs. Carleton & Lockett, 8 L. 264.

5. Where question is the sufficiency of cause for compelling forced surrender and the mode of making same.

Savage vs. Jeter, 13 A. 289.

6. Where landlord sues for expulsion of tenant.

Wallace vs. Smith, 8 A. 376; Pesant vs. Heartt, 22 A. 292.

7. Proceedings against sheriff for failure to perform official duties.

R. S. 3598; State ex rel. Attorney General vs. Budd, 39 A. 232

CHAPTER X.

OF THE VARIOUS OFFICERS OF COURTS OF ORIGINAL JURISDICTION.

758. Officers—The officers of courts of original jurisdiction are sheriffs, clerks, translators, criers and constables.

Stenographers.

Act 28 of 1890.

759. Appointment of Officers—Duration of Term, etc.
 —The rules concerning the appointment of these officers, the duration of their terms of service, and their emoluments, are determined by special laws.

In this section we shall treat only of their duties in relation to civil suits prosecuted before tribunals.

SECTION I.

Of the Duties and Powers of Sheriffs in Civil Matters.

760. Sheriff Must Execute Orders—It is the duty of the sheriff of each parish to execute the judgments and orders of the Supreme, district, parish and probate courts, directed to him, agreeably to law.

C. P. 1047.

(A) Writ protects sheriff:

1. When court is one of competent jurisdiction, order protects sheriff.

Went vs. Morgan, 3 L. 311.

2. But officer must know that court is of competent jurisdiction.

Lafon vs. Dufrocq, 9 A. 351; Mayer vs. Morgan, 7 N. S. 52; Lowry vs. Erwin, 6 R. 192.

(B) When sheriff alone liable:

When he or deputies are guilty of negligence, recklessness or illegal acts, and plaintiff in execution has given no instructions.

Gusman vs. DePoret, 33 A. 339; Barrimore vs. McFeeley, 32 A. 1182; Mayes vs. Schmidt, 11 A. 476.

(C) Liability for acts of deputies:

Sheriff is liable only civilly for acts of deputy except where he acts in collusion.

State ex rel. Attorney General vs. Budd, 39 A. 232; Grabenheimer vs. Budd, 40 A. 109; Wilkins vs. Bobo, 13 A. 430; Marshall vs. Simpson, 13 A. 437; Bogel vs. Bell, 15 A. 163.

(D) Extent of liability:

Injured party can not hold sheriff for more than he would have realized had sheriff or deputy done his duty.

Marshall vs. Simpson, 13 A. 437; Bogel vs. Bell, 15 A. 163; Grabenheimer vs. Budd, 40 A. 109.

(E) Punishment of deputy:

For malfeasance or gross misconduct, deputy is removable and may be fined and imprisoned.

State ex rel. Attorney General vs. Budd, 29 A. 232.

(F) Sheriff can not bid at sale made by him:

McCluskey vs. Webb, 4 R. 204.

1. *Quere?* Whether such sale is not mere relative nullity.

Prothro vs. Prothro, 33 A. 598.

2. But deputy may bid at sale made by sheriff.

Hewett vs. Stephens, 5 A. 640.

(G) Sheriff is executive officer of court:

And where court orders something to be done and designates no one else, sheriff executes the order.

Avery vs. Police Jury, 15 A. 223.

761. Territorial Limits to Power of Sheriff in Cases of Arrest—Regularly, sheriffs can only exercise their duties in the parish for which they are elected; but they may arrest a debtor taking refuge in another parish, and the original writ granted by the judge shall be sufficient warrant, at all times, for the officer to make the arrest in any parish in this State, without any further certificate or formality.

(Amended) C. P. 781.

1. *Sheriff acts in place of constable—when:*

By Act 110 of 1888, p. 174, it is enacted: "That in case of inability to act on the part of the constable, because of relationship, sickness or otherwise, in civil suits, the justices of the peace throughout the State are authorized to employ either the sheriff or his deputy to execute all orders, citations, summons, seizures and writs.

Sec. 2. "That when there is a constable not disqualified to act because of relationship, or unable on account of sickness and who is willing to act, then, in that case, the justice of the peace for whose ward said constable shall have been elected or appointed and qualified shall employ said constable, to the exclusion of the sheriff or his deputy, to execute all orders, citations, summons, seizures and writs, in civil cases, and in such a case services made by other than said constable shall be void and of no effect."

2. Deputy can act only in his parish:

Sheriff of Pointe Coupee can not delegate deputy sheriff of Iberville to make service in Pointe Coupee.

State vs. Boiteaux, 81 A. 188.

762. Use of Force When Necessary—In executing the orders and judgments with which they are charged, sheriffs may enter on the lands and in the house of a debtor, break the doors, remove the furniture if the execution can not be effected by other means, may remove obstructions which any person may have placed in the high road; in short, they may do all such acts as are necessary in the execution of the orders or judgments with which they are charged; and if resistance be offered, they may require assistance from the neighbors or persons passing by.

C. P. 682.

(A) Use of force:

Sheriff may use force when necessary.

Winn vs. Elgee, 6 R. 100.

(B) Posse comitatus:

Sheriff may summon minor if able-bodied to compose *posse comitatus*.

R. S. 8544; Coats vs. Roberts, 35 A. 891.

763. On What Days Sheriff May Act—But the sheriff can not execute the orders or judgments with which he may be charged, in civil matters, on the days and hours excepted by the preceding provisions of this Code, nor arrest a debtor going to or returning from a muster of the militia.

C. P. 207.

764. Naming Deputies With Approbation of Court—Their Duties—Oath—Every sheriff may, with the approbation of the court in which he exercises his duties, name as many deputies as he thinks fit, but he remains respon-

sible for them, and they must, before entering on their duties, take an oath before the parish or district judge, to perform faithfully the duties required by law from the sheriffs by whom they are named.

This appointment and oath shall be entered on the records of the court.

Nevertheless, such deputies shall be subject to fine and imprisonment, or either, for delinquency of duty, as provided by special laws.

Discretion of judge as to appointments:

Mandamus does not lie to district judge to coerce approval of nomination of deputy by the sheriff.

State ex rel. Reid vs. Read, 41 A. 78.

765. Sheriff Responsible for Constables When Using Them—Sheriffs may notify and execute, by means of constables, the different orders, citations, summonses, and judgments which they are directed to give notice of and to carry into execution, they being responsible, however, for the manner in which the constables may perform this duty.

(A) Liability of sheriff for act of deputies:

Sheriff liable only civilly for acts of constable or deputy, except where he is in collusion.

Attorney General vs. Budd, 39 A. 232.

(B) Bond of indemnity:

1. Sheriff may demand bond:

Act 37 of 1882 amends and re-enacts R. S. Section 3579:

"In all cases wherein the sheriffs or constables of this State may have seized or may be required to seize any personal property, by any mesne or final process issuing from a court of competent jurisdiction, and which property shall be claimed by a third person as owner, either personally or in a representative or fiduciary capacity, it shall and may be lawful for him, upon giving notice to the plaintiff or his attorney, and allowing due time for the execution

thereof, to demand a bond of indemnity, signed by the plaintiff or his attorney, with solvent security in an amount double the value of the property seized, conditioned for the payment of all damages which said sheriff or constable may sustain in case such third person should be adjudged the owner of said property; provided further, that before any bond of indemnity can be required of the plaintiff, the third person claiming the property, or his attorney, having personal knowledge of the facts, shall make affidavit that he is the real *bona fide* owner of such property, either personally or in such representative or fiduciary capacity as aforesaid, and shall therein fully set forth all the facts on which his title or claim of ownership is based."

8. United States marshals may in proper cases ask for bond of indemnity.

Foucher vs. Kenner, 36 A. 151; *Moncure vs. Zuntz*, 11 Wall. 416; *Baras vs. Bidwell*, 3 Woods, 5, 8, 9.

(C) Liability of sheriff:

1. Sheriff liable when he seizes property of third person over protest, and does not call for bond of indemnity.

Benner & Ranlett vs. Michel, 23 A. 469; *Macias vs. Sheriff*, 41 A. 300; *Macias vs. Sheriff*, 43 A. 239; *Chapuis vs. Waterman*, 84 A. 58; *Atkinson vs. Atkinson*, 15 A. 491.

2. Such third person is not compelled to enjoin or intervene.

Id.; *Lannes vs. Courage*, 81 A. 74; *Duperon vs. Van Wickle*, 4 R. 89.

3. Sheriff or marshal not responsible for damages for seizing property on which a privilege is recognized in judgment.

Foucher vs. Kenner, 36 A. 151; *Elmore vs. Hufty*, 18 A. 227; *Hunter vs. Bell*, 14 A. 142; *Rau vs. Katz*, 26 A. 463; *Buck vs. Colbath*, 8 Wall. 334.

4. Nor failure to collect rents where person in possession was owner and when they offered to seizing creditor use of their names for all useful purposes.

White, Richards & Co. vs. Waggaman, 36 A. 394; *Conte vs. Handy*, 34 A. 862.

Sureties on indemnity bond liable only where sheriff or marshal would be liable.

Foucher vs. Kenner, 36 A. 150.

5. Sheriff releasing a seizure under one writ and giving an illegal and unjust preference in favor of another, will be liable to plaintiff in first execution.

Lynch & Co. vs. Leckie, 9 A. 506.

6. And will be liable for goods damaged while under seizure, as for improper storage, or illegal acts, where seizing creditor does not instruct.

Latiolais vs. Citizens' Bank, 33 A. 1444; *Gusman vs. DePoret*, 33 A. 122; *Barrimore vs. McFeely*, 32 A. 1182; *Mayes vs. Schmidt*, 11 A. 478.

7. And also when he executes first a writ of attachment placed in his hands after another one, the plaintiff can only hold sheriff for amount he would have realized had writ been properly levied.

Grabenheimer vs. Budd, 40 A. 107.

8. Also where he gives time to bidder not complying with his bid.

Walker vs. Allen, 19 L. 307; *Gallier vs. Garcia*, 2 R. 819.

(D) Sheriff liable only for actual damages in absence of malice.

Bogel vs. Bell, 15 A. 163; *Macias vs. Sheriff*, 48 A. 294.

1. *Elements of actual damages:*

- (a) Attorney's fees paid in injunction suit to stay sale.

Chappuls vs. Waterman, 34 A. 60; *Given vs. White*, 29 A. 57; *Dyke vs. Walker*, 5 A. 519; *Willis vs. Scott*, 11 A. 10.

- (b) But not attorney's fees in prosecuting action for damages.

Chappuls vs. Waterman, 34 A. 60.

766. Duty of Sheriff to Pay Over Funds, etc.—It shall be the duty of the sheriffs to pay over to the parties entitled to the same all sums of money received or collected by them, by virtue of an order or judgment of a court, and all moneys, bonds or obligations which they hold in their official capacity, on the first demand, made for that purpose by said parties, their attorneys, or agents.

(A) When sureties of sheriff are liable.

1. They can not be held where purchaser, instead of retaining amount of his bid necessary to pay mortgage or privileged claims ranking that of seizing creditor, pays the same to sheriff.

Bacas vs. Hernandez, 31 A. 85; *Pepper vs. Dunlap*, 16 L. 163; *MERCHANTS' Bank vs. Peters*, 2 R. 214; *Cummings vs. Erwin*, 15 A. 239; *Ins. Co. vs. Gillingham*, 1 R. 805.

2. Where summary remedy is used, as by rule, to which no exception is made below, none will be heard on appeal.

Quertier vs. Succession of Hille, 18 A. 65; *LeBœuf vs. Marie*, 1 A. 124.

(B) Prescription of actions against sheriff.

1. Prescribed, as against sheriffs and their sureties, by lapse of two years from date at which right of action accrued.
Succession of McCloskey, 52 A. 146; Hernandez vs. Hugh, 25 A. 360; Hardee vs. Dunn, 18 A. 161.
2. But where action is for passive violation of official duty, as failure to pay over money collected, putting in default necessary and prescription runs from date of demand.
Succession of McCloskey, 52 A. 146; Soule vs. Norwood, 80 A. 486; Fuqua vs. Young, 14 A. 216; Kohler vs. Walden, 28 A. 279.
3. Previous to 1837 prescription was one year.
Semper vs. Buhler, 6 N. S. 665; Fisk vs. Browder, 6 N. S. 691.

(C) Following actions against sheriffs and sureties prescribed by two years:

1. To recover proceeds of sale under *feri facias*.
Mulholland vs. Henderson, 8 R. 297.
2. To recover damages for wrongful seizure.
Brice vs. Jones, 5 A. 635.
3. To recover money received in official capacity.
Kohler vs. Walden, 28 A. 299.

(D) When prescription of two years will not apply.

See Spalding & Rogers vs. Walden, 23 A. 476; State vs. Ranson, 26 A. 126.

(E) When current of prescription begins:

1. Where wrong complained of is malfeasance, an active violation of official duty, prescription runs from date of act, as a false return or wrongful seizure. No putting in default necessary.
Succession of McCloskey, 52 A. 146.
2. But for moneys collected and not paid over, putting in default necessary and prescription runs from demand.
Soule vs. Norwood, 80 A. 486; Fuqua vs. Knight, 14 A. 216.

767. Failure of Sheriff to Pay Over Funds, etc.—Remedy—Penalty.—And if any sheriff neglect or refuse to pay over the funds in his hands on said demand, the party aggrieved may proceed against said sheriff, by motion, of which twenty-four hours' notice shall be given; and if it appear to the satisfaction of the court that the sheriff has neglected or refused to pay over any

funds, or deliver any bonds or obligations in his possession to the party entitled to the same, without any legal cause or reasonable excuse, he shall be removed from office, and the court shall condemn him to pay to the claimant, as well the sum due, as twenty per cent. damages per annum, reckoning from the time when the money ought to have been paid.

1. Right of sheriff to retain funds to pay costs.

Haile vs. Rills, 9 R. 509; *Sullivan vs. Bellocq*, *Noblem & Co.*, 20 A. 365.

2. He can not set up defences personal to plaintiff or defendant.

Chase vs. Bell, 32 A. 461; *Lynch vs. Leekie*, 9 A. 506.

3. Proceeding by motion proper against sheriff, but not against sureties unless specially allowed by statute.

Soule vs. Worsham, 22 A. 79; 6 R. 435; 3 A. 206, 434; 12 A. 201; 14 A. 200.

768. Duty as to Fines—The sheriff is bound to recover and account for all fines which are imposed by the different courts of his parish, and shall pay the amount every six months; those which are for the benefit of the State, into the hands of the State Treasurer, and those which accrue to the parish into the hands of the treasurer of such parish.

Such fines shall be collected in the manner prescribed by special laws.

769. Penalty for Failing to Pay Over Fines—The sheriff who shall neglect to make payment of the fines recovered by him at the times fixed by the preceding article, shall be condemned to pay the amount, on motion in the name of the State by the treasurer into whose hands the payment should have been made, before the court of the district or parish where the sheriff resides.

770. Sheriff May Swear Appraiser—When the sheriff causes property to be appraised, which has been seized or

distrained by him, said sheriff, or any judge or justice of the peace, may administer the oath to the appraiser; but the said sheriff shall receive no fee or compensation for the administration of said oath; nor shall he administer an oath in any other case than the one now mentioned, or in such others as the law shall make provision for.

771. Power of Deputies—Coroner Cannot Appoint Deputy—The deputy sheriff may represent the sheriff in all the duties confided by law to the latter, but this power ceases in all case where the duties of the sheriff are fulfilled by the coroner, as directed in the next article.

Powers of deputy sheriff:

He represents sheriff, and has power:

1. To sign deeds of sale.

Kellar vs. Blanchard, 21 A. 44.

2. To sign notices of seizure or advertisement.

Wallis vs. Thomas, 6 A. 76.

- 3 To administer oath to appraisers.

Copeland vs. Labatut, 6 A. 61; Lambert vs. De Santos, 10 A. 725.

4. To amend return, even after termination of his official powers, and after his return is attacked.

Elmore vs. Bell, 2 R. 484; Aubert vs. Buhler, 3 N. S. 489.

772. When Coroner Acts—The coroner is appointed to perform the duties of the sheriff, where that office is vacant, either by the death, resignation, or removal of the incumbent, until a successor has been appointed.

The coroner also discharges the duties of the sheriff, whenever the latter is interested in a cause.

773. Appointment and Duties of Coroners—The provisions relative to the appointment of coroners, and the duties exclusively confided to them, are prescribed by special laws.

SECTION II.

Of the Duties and Powers of Clerks.

774. Duties of Clerks—Clerks shall issue all orders or writs in the name of the State of Louisiana, and from the courts from which they issue, and shall seal them with the seal of such court, and sign them with their own names, designating their quality as clerks.

C. P. 179, 626, 1045.

(A) Duties of clerks:

Art. 122 of Constitution of 1879; Art. 88 of Constitution 1868.

1. To give bond.

Act 58 of 1890.

2. To regulate their fees according to law.

Act 136 of 1890.

3. To certify records made from their books recording petition, answer and pleadings, with judgments, interlocutory and final, to serve in civil or criminal cases as evidence when originals are lost.

Act 17 of 1878.

4. To make transcript properly, failing in which he will be ordered to make one anew at his own cost.

Edson vs. McGraw, 87 A. 294; Trounstine vs. Ware & Munn, 88 A. 72.

(B) Clerks issue orders and writs:**1. An order granted and signed by the clerk for an attachment to issue needs no seal. The writ itself must have seal.**

Seeligson & Co. vs. Rigmalden & Co., 87 A. 723.

2. Seal necessary to authenticate citation, subpoenas and court records.

State vs. Brown, 88 A. 1151; Campbell, Richtie & Co. vs. Karr, 7 L. 7; Smith's Heirs vs. Blount, 10 L. 483; Ward's Heirs vs. Bowman, 13 L. 570; Thompson vs. Freeman et al., 84 A. 936.

(a) But certificate attached to transcript of appeal requires no seal.

Wood vs. Harrell, 14 A. 61.

(b) And where the copy of a document shows no seal, original may be inspected to show that there was a seal to it.

Conway vs. Erwin, 1 A. 891; Mealey vs. Voris, 2 A. 140.

3. Certificate of authenticity of record must emanate from clerk himself, not deputy.

- Gerald vs. Gerald, 5 A. 245.

(C) Powers of clerks:

1. Of clerks out of the parish of Orleans.

See Acts 106 of 1880, 43 of 1882, 75 of 1884 and 187 of 1888.

Act 106 of 1880 was superseded by Act 43 of 1882.

2. Act 43 of 1882 provides:

Section 1. That the clerks of the district courts throughout the State, the parish of Orleans excepted, shall have power, whether the judge be present or absent from the parish, to grant orders for writs of arrest, attachment, sequestration, provisional seizure, and to fix the amount of bond therefor, except when the amount is fixed by law.

Act 75 of 1884 grants the additional power, in the absence of the judge from the parish, his recusation or inability to act, to grant orders of garnishment under writs of *fi. fa.* or attachments and orders of appeal, and to fix the amount of the bonds for such appeal, where the same is not fixed by law; and in such cases the absence, recusation or inability of said judge shall be made to appear by the oath of the party or his attorney annexed to the petition or application. That the powers herein conferred upon clerks of court shall be exercised by them alone, and not by their deputies.

Sec. 2 of Act 43 of 1882: That they shall have power to administer oaths in all cases; to order calls in warranty and to issue citations thereon; to issue commissions to take the testimony of witnesses residing in or out of the State; to fix the return day thereof, and to appoint commissioners to execute the same; to grant orders for affixing seals; taking inventories; to appoint and confirm tutors, under-tutors, dative testamentary executors, administrators and curators of vacant successions, after giving the notices prescribed by law; provided, that no opposition be made thereto.

Sec. 3. That they shall have power to take necessary bonds required of tutors, dative testamentary executors, administrators, curators of vacant successions, curators of inter-

dicted persons, syndics of insolvent successions, and syndics of insolvent debtors; to order family meetings, to convoke meetings of creditors of insolvent successions, of insolvent debtors, and to homologate their proceedings, when not opposed: to issue orders for the advertisements of the filing of accounts and tableaux of tutors, of executors, of administrators, of curators of vacant successions, of curators of interdicted persons, of syndics of insolvent successions and of syndics of insolvent debtors.

Sec. 4. In the absence of the judge from the parish, or in case of his recusation, they shall have power to allow interventions, grant orders of third opposition with or without injunction, appoint special tutors or tutors *ad hoc* to minors, appoint curators and curators *ad hoc*, appoint advocates to absentees. They shall also have power to grant orders setting aside writs of arrest, attachments, provisional seizure, sequestration, and to fix the amount of bond therefor, except when the amount is fixed by law; to grant orders for the sale of succession property upon the application of the administrator or curator; provided, the application be accompanied by a statement of the debts of the succession.

Sec. 5. In the absence of the judge from the parish, or in case of his recusation, they shall also have power to order the execution of wills and to confirm testamentary executors; provided, no opposition be made thereto; to order executors, tutors, administrators, curators and syndics to file accounts within ten days after such an order may be served; and it shall be their duty to grant such orders when required by any party in interest; an additional day shall be allowed for every ten miles between the residence of the party so ordered and the court house.

Sec. 6. In all cases in which the clerk is empowered by this act to grant orders in the absence of the judge from the parish, or in case of his recusation, the oath of the party or his attorney, that the judge is absent from the parish, or that being recused he is unable to give the order, must be annexed to the petition or application; provided, that when the clerk grants orders of injunction for a specific sum of money he shall require bond in an amount equal to one-half of the sum enjoined, and when the sale of specific property is enjoined by the defendant, or any third party,

the bond shall be for an amount equal to one-half of the estimated value thereof, as certified to by the officer making the seizure, or in an amount equal to one-half of the claim under which the seizure was made, at the option of plaintiff in injunction.

Sec. 7. In all cases of opposition filed in the clerk's office, it shall be his duty to place the opposition on the docket of the court; in all cases where the orders granted by the clerk requires the services of a notary, the commission shall be issued by the notary indicated by the party obtaining the order.

Sec. 8. Amended and re-enacted by *Act 137 of 1888* as follows: Clerks, with the approval of the judge, may appoint deputies, who shall take the oath required by the Constitution; they shall exercise all the powers granted to clerks, *ex-officio* recorders of conveyances, mortgages and other acts, and *ex-officio* notaries public, and *ex-officio* clerks of courts of appeal, except such judicial powers as are herein or may hereafter be granted pursuant to Article One Hundred and Twenty-two (122) of the Constitution, which shall belong to the clerk alone and to the chief deputy clerk when the clerk is absent from the county seat, or from any cause is unable to act; provided, that the chief deputy clerk shall in no case be authorized to bond an injunction or any conservatory writ. In the event of the death, resignation or removal of any clerk of district court, one or more of them, to be designated by the judge, shall continue in office until his successor shall have been appointed or elected and duly qualified.

Sec. 9, of *Act 43 of 1882*: Nothing in this act shall be so construed as to interfere with or curtail the powers or duties of clerks or their deputies under existing laws.

N. B.—Act 13 of 1894 amends Act 43 of 1882, granting clerks in country additional powers.

(D) Strict construction of powers:

Powers of clerks of issuing orders, for administration of justice, according to constitutional requirement, must be specified and determined. They are excluded when not clearly given.

State ex rel. Boyd vs. Green, 84 A. 1029; *Neda vs. Fontenot*, 2 A. 784; 10 A. 496; *Gerald vs. Gerald*, 5 A. 245; 12 A. 612; *Succession of Tanner*, 22 A. 91.

(E) Appealability of orders by clerks.

Orders granted by clerks can be appealed from or annulled when they could be if granted by judge.

State ex rel. Boyd vs. Green, 84 A. 1029.

(F) Clerk has no power:

1. To approve tableaux of debts, homologate accounts of administration and authorize administrators to pay debts.

Succession of Price, 85 A. 907.

2. To appoint administrator unless there is an order for such appointment—even though the order itself must emanate from the clerk.

Succession of Picard, 83 A. 1136; *Wirt vs. Pintard*, 40 A. 232.

3. To accept cession of insolvent and stay proceedings against person and property.

State ex rel. Boyd vs. Green, 84 A. 1027.

4. To issue order of seizure and sale; but he may order sale under C. P. 990.

Davie vs. Scriber, 86 A. 651.

5. To give order to bond sequestered property.

Clapp & Co. vs. Phelps & Co., 19 A. 461.

Aliter now under Sec. 4, Act 43 of 1882.

6. To probate a will.

Succession of Tanner, 22 A. 98.

Aliter now under Sec. 5 of Act 43 of 1882.

(G) Clerk has power:

1. To issue injunction in absence of judge or when he is interested.

Witkowski vs. Selby, 15 A. 828.

2. To issue *f. fa.* on twelve months' bond.

Cobb vs. Richardson, 80 A. 1228.

3. To order sale of succession property.

Herriman vs. Janney, 81 A. 276; *Woods vs. Lee*, 21 A. 507; *Succession of Boyd*, 12 A. 612.

4. To issue a bench warrant.

State vs. Gordon, 18 A. 523.

5. To issue commission to take testimony.

Cannon vs. White, 16 A. 88; *Bradford vs. Cooper*, 1 A. 325; *Ferrier vs. Latting*, 9 A. 169; *Rhodes vs. Myers*, 16 A. 898.

(H) Rights of clerk:

As to transcript of appeal: He may demand payment before delivery.

State vs. Behrens, 17 A. 67; *State vs. Phillips*, 6 R. 306; *Acts 1872*, p. 71, No. 24; *State ex rel. Richard vs. Clerk*, 28 A. 590; but see *alter before Act 24 of 1872*; *State ex rel. Kearney vs. Clerk*, 22 A. 563; *State ex rel. Washington vs. Clerk*, 23 A. 762; *State ex rel. Anseline vs. Clerk*, 22 A. 585; 22 A. 578; 22 A. 508.

(I) Clerks amenable to their own judges only:

Hence district judge will not have power to investigate acts of clerk to Supreme Court.

Gee vs. Drew, 38 A. 774.

(J) Powers of deputy:

May ordinarily perform such functions as clerk himself. He may—

Sign certificate to transcript of appeal.

Burton vs. Hicks, 27 A. 507; *Downs vs. Tarkington*, 3 A. 247; *Bank vs. Watson*, 15 L. 33.

And clerk's name need not be in the body of the certificate, or in transcript of appeal.

Elder vs. New Orleans, 31 A. 500.

775. Clerk's Duty to Keep Record Books—Clerks shall keep at least two record books.

C. P. 1045.

776. Record of Cases—In one they shall set down in order the titles of all causes depending before the court, mentioning the date of the filing of the petitions or answers, and the names of the counsel employed by the parties.

1. Party filing document with clerk must see that it is actually filed. Motion to dismiss is not properly in the record if not marked filed.

Ford vs. Brooks, 35 A. 151.

2. Clerks may record mandates of Supreme Court and issue all necessary process for their execution.

Edwards vs. Whited, 29 A. 647; *State ex rel. Bovee vs. Herron*, 24 A. 619.

777. Minute Book—In the other they shall set down all the orders and judgments rendered, as well as the motions made by the parties or their counsel.

C. P. 544; *Amet vs. Boyer*, 42 A. 833.

(A) Minutes of court:

1. Minutes are presumed truthfully entered.

State vs. Shellang, 34 A. 850.

2. Courts have power to correct minutes to conform to truth either in chambers or in term time.

Picard & Well vs. Prival, 35 A. 871; *State vs. Folke*, 2 A. 744; *State vs. Cox*, 33 A. 1057; *State vs. Mason*, 52 A. 1018; *State vs. Onmacht*, 19 A. 196; *State vs. Frith*, 14 L. 191; *State vs. Alvarez*, 7 A. 283; *State vs. Gates*, 9 A. 94; 34 A. 869.

3. Minutes not impeachable by parol evidence.

Mann vs. Mann, 33 A. 852; *Green vs. Reagan*, 52 A. 974; *Taylor vs. Jones*, 3 A. 621; 40 A. 135; 40 A. 862; 34 A. 1117.

4. But neither in civil nor criminal cases can court change its minutes in chambers on *ex parte* motion without notice to parties.

Picard & Well vs. Prival, 35 A. 871; *State vs. Revells*, 31 A. 887; *State vs. Smith*, 31 A. 406; *State vs. Branch*, 25 A. 115.

5. No evidence is necessary to correct minutes when judge knows facts.

State vs. Branch, 25 A. 115.

6. Minutes may be corrected even after appeal, if made contradictorily.

State vs. Howard, 34 A. 869; *State vs. Tessier*, 32 A. 1237; *State vs. Revells*, 31 A. 887; *State ex rel. Ogden, Attorney General, vs. Judge*, 31 A. 557; *State vs. Smith*, 31 A. 406.

7. Correction may be made out of term, or at a subsequent term, or even though a different judge be on the bench.

State vs. Folke, 2 A. 744.

8. Corrected minutes brought up under *certiorari*, and judge may be mandamused to make correction.

State vs. Gates, 9 A. 94.

(B) Nunc pro tunc entries.

1. *Nunc pro tunc* entry on minutes may be made of matters inadvertently omitted, not where matter to be entered is entirely new.

Lemann vs. Truxillo, 52 A. 75.

2. *Nunc pro tunc* entries on minutes may be made of:

(a) Order of appeal by oversight omitted from the minutes.

Dykes vs. Cockrell, 7 A. 707.

(b) Signing of judgment rendered at a previous term.

State vs. Wyat et al., 7 A. 701.

(c) Enactment and promulgation of ordinance of police jury omitted from minute book of police jury.

Bathurst vs. Course, 8 A. 260.

778. Records Open to Inspection—Index—Both these records shall be open to the inspection of all parties interested or their counsel, and shall be accompanied by an alphabet containing the titles of the causes, with the number of the pages on which are to be found the motions, orders, or judgments relating to them.

779. Safe Keeping of Records—Clerks shall preserve with the greatest care the pleadings, documents and papers confided to them, as well as the minutes of the court, and they shall be provided with closets or desks in which these papers may be kept safely and under key.

780. Penalty Where Clerk Fails or Refuses to Make Copies, etc.—If any clerk of the court shall neglect, fail or refuse to issue any copy, paper, citation, writ or other process, when so required to do by any party, or their counsel authorized to require such service, who has made the proper deposit and complied with the requirements of law authorizing them to demand such service from the clerk, such clerk shall, on such facts being brought to the attention of the court, in writing, sworn to by the party making it, which shall be served with the order made thereon by the judge, fixing the time for trial thereof, not exceeding two days from the date of the order, be brought to trial, which trial shall be summary and without jury; and if such clerk shall be found guilty of the charge,

he shall be considered in contempt of court, and be fined in a sum not exceeding one hundred dollars, or imprisoned not exceeding thirty days, or suspended from office, either one or all, and the clerk and his securities on his official bond shall be responsible to any party for any damage that may result from his failure, refusal or neglect to perform any duty required of him by law.

781. No Fee Where Process Defective—If the clerk of any court fail to comply with any legal formality in issuing citations, petitions, or other process, or if the same be not a true copy, or legal in form or substance, no fee shall be charged by the clerk for issuing such copy or process; and he shall, moreover, be responsible to the sheriff for any cost he may incur in executing, or attempting to execute, any such process, and the parties to such suit shall not be charged with any of the clerk's or sheriff's costs above referred to.

782. Clerks Have Right to Appoint Deputies—Oath—Clerks of district courts shall have the right to appoint as many deputies as they may deem advisable, who shall perform ministerial acts only, and who shall take the oath prescribed by the constitution of the State, and who shall discharge the duties imposed upon them as such by law; provided, that it shall be the duty of the clerk of each district court in this State to appoint a deputy competent to discharge the duties of a minute clerk to such court, when the clerk does not perform this duty, and no such deputy clerk shall act as minute clerk until his appointment shall be approved by the judge of such court.

783. Duties Imposed by Law on Clerks and Sheriffs—All the duties imposed by law on sheriffs and clerks

shall continue in every thing not contrary to, or incompatible with, the provisions contained in the present chapter.

SECTION III.

Of Translators, Criers and Constables.

784. Translators and Criers Hold Office for One Year—

It is the duty of the translators and criers appointed by the different courts to attend punctually for the fulfilment of the duties imposed upon them, who shall hold their offices for one year.

785. Courts May Appoint Translator—His Oath—If

there be no translator appointed, or he should be absent, the court may appoint one, if necessary, at the request of one of the parties, who shall take an oath to execute well and faithfully, to the best of his knowledge, such translations as he is charged with, unless the attorneys for the parties agree that they themselves or one of them shall do it.

CHAPTER X.

OF ORDERS WHICH COURTS OF JUSTICE MAY RENDER IN CERTAIN CASES.

786. Summary Orders Which Courts May Render—

Besides the powers which are granted to courts of justice according to the provisions above mentioned, there are others conferred on them in certain cases, which are exercised in a summary manner, without going through the ordinary forms of action.

It is of these powers, and the manner of their exercise, that we shall treat in the present chapter.

787. Habeas Corpus—The first of these powers is that

of issuing the *habeas corpus*, that privilege granted to all free persons of being released from illegal arrest or detention.

788. Other Powers—The other extraordinary powers belonging to courts of justice may be divided into two species, which are enumerated in the two following articles.

789. Mandamus and Prohibition—Courts of justice may, in certain cases hereafter provided, direct orders to individuals or corporations to compel them to perform certain duties prescribed for them by the law, or to prevent them from usurping powers which do not belong to them.

790. Orders to Lower Judges—Courts of appeal have the right to issue orders to inferior judges:

1. **Mandamus and Prohibition**—To compel them to render justice to parties or to perform certain duties belonging to their office, or to prevent them from usurping an authority which does not belong to them.

2. **Certiorari**—To oblige them to send up a copy of their proceedings, that the validity of them may be examined when they are accused of having violated any of the forms of law.

SECTION I.

Of the Writ of Habeas Corpus.

791. Habeas Corpus—The *habeas corpus* is an order in writing, issued in the name of the State by a judge of competent jurisdiction, and directed to a person who has another in his custody, or detains him in confinement, commanding him to bring before the judge the person thus detained, at the time and place appointed, and to

state the reasons for which he thus keeps him imprisoned and deprived of liberty.

C. P. 1041.

792. By Whom Issued—The Supreme Court, and each of the judges thereof, shall have power to issue writs of *habeas corpus*, at the instance of persons in actual custody, in cases when they may have appellate jurisdiction; and district judges shall have the right of granting writs of *habeas corpus* within the limits of their respective jurisdictions, except in the case provided by the following article.

C. P. 1041.

By whom Habeas Corpus issued:

1. Supreme Court or any judge thereof:

Art. 89 of Constitution of 1879 says: "The Supreme Court and each of the judges thereof shall have power to issue writs of *habeas corpus* at the instance of persons in actual custody in cases where it may have appellate jurisdiction."

Supreme Court or judges thereof can issue writ of *habeas corpus* only in cases where Supreme Court may have appellate jurisdiction; it is otherwise as to writs authorized under Art. 90.

State ex rel. DeBuys vs. Sheriff, 82 A. 1225; State ex rel. Brown vs. Houston, Judge, 85 A. 1194; *In re* William Ross, 88 A. 528; Wood's Case, 80 A. 672; State vs. Fenderson, 28 A. 82; State ex rel. Sinnott vs. Falls, 82 A. 555.

2. Courts of appeal. Constitution Art. 104: "The judges of courts of appeals shall have power to issue writs of *habeas corpus* at the instance of all persons in actual custody within their respective circuits."

3. District judge. The district judges shall have power to issue writs of *habeas corpus* at the instance of all persons in actual custody in their respective districts. Contempt not appealable though committed in appealable case.

State ex rel. Brown vs. Judge, 85 A. 1194; Wood's Case, 80 A. 672; State ex rel. Sinnott vs. Falls, 82 A. 555; State ex rel. DeBuys vs. Judge, 82 A. 1225; but see State ex rel. Orden vs. Sauvinet, Sheriff, 24 A. 120.

793. By Judge of Adjoining District—When—When

the judge of any district is absent, interested, or prevented by any cause whatever from acting in that quality, and there is no criminal court or court of concurrent jurisdiction in the district, the *habeas corpus* may be issued by any judge of competent jurisdiction in one of the adjoining districts. But, in this case, the absence, interest or disability of the judge of the district where the imprisonment exists, shall be made to appear by the oath of the petitioner or other sufficient proof.

When district judge absent, Supreme Court may issue *habeas corpus*.

State ex rel. Condon vs. Sheriff, 36 A. 855.

794. How Writ Obtained—The *habeas corpus* may be obtained on a petition being addressed to a judge who has the power of granting it. It must be signed by the party, or some other person in his name, mentioning in the latter case the name of the party confined.

795. Recitals of Petition—This petition shall state, in substance, that the party applying is imprisoned or deprived of liberty, and by whom, if the person's name be known, or if it be not known, by designating or describing his person, so far as possible.

796. Copy of Order Imprisoning, when Imprisonment by Judicial Order—If the imprisonment or detention exists, by virtue or under pretext of a judicial order, the copy of such order shall be annexed to the petition, or the petitioner shall allege that a copy of it has been demanded and refused.

797. Recitals of Petition—If the imprisonment or detention took place by virtue of a judicial order, regular in its form, but illegally obtained or executed, the petition shall mention in what the illegality consists.

798. When Imprisonment Not by Judicial Order—If the imprisonment or detention has not been made by virtue of a judicial order, the petitioner need only allege that he is illegally imprisoned or confined.

799. Prayer of Petition—The petition shall conclude by praying for a *habeas corpus*; the petitioner shall swear that it contains the truth to the best of his belief.

800. Order for Writ—The judge to whom this petition is presented, if he has the power of issuing a *habeas corpus*, shall immediately grant one to the petitioner, unless it appears by the petition itself, or by the documents annexed to it, that the party can not be set at liberty, nor admitted to bail.

801. When Granted in Court—The *habeas corpus* may be granted in court, with the signature of the clerk, and the seal of the court, or out of court under the signature alone of the judge to whom the petition is presented.

802. By Whom Writ Served—The *habeas corpus* may be served by any male person capable of giving evidence.

803. Service—Concealment of Defendant—The person to whom the writ is delivered may serve it by delivering it to the person to whom it is addressed, or who keeps the party in confinement; and if that person refuse to receive the writ, he who is charged to serve it shall inform him of its contents.

But if the person to whom the *habeas corpus* is addressed, conceal himself or refuse admittance to the person charged to serve it on him, the latter shall affix the order on the exterior of the place where the person resides, or in which the petitioner is confined.

804. Service—How Proved—The service of the *habeas corpus* shall be proved by the affidavit of the person directed to serve it.

805. Return of Writ—It is the duty of the person on whom the *habeas corpus* is served, whether it be directed to him or not, to obey and return the order without delay to the court which issued it.

806. Production of the Person to be Set at Liberty—Obedience to the *habeas corpus* is manifested on the part of the person to whom it is directed, by his producing the person to be set at liberty, if that person be in his custody; and by making on the back of the order, or separately, his answer in writing, in the form and manner hereafter directed.

807. Answer of Respondent—The person on whom a *habeas corpus* is served shall declare positively in his answer:

1. Whether he has or has not in his power or custody the person to be set at liberty, or whether that person is confined by him.

2. By what authority and for what cause he arrested or detained him.

808. Recitals of Answer—If the person on whom a *habeas corpus* is served had held the petitioner in confinement, or had detained him within three days preceding the service, or had transferred the custody to another, he shall state particularly in his answer to whom, at what time, for what cause, and by what authority, he made the transfer.

809. Original Order Annexed to Answer—If the petitioner be kept in custody by virtue of a judicial order, the original of that order must be annexed to the answer.

810. Signature and Affidavit to Answer—This answer must be signed and sworn to by the person making it.

811. When Person Need Not Be Produced—Whenever a *habeas corpus* shall have been obtained for a person who is confined by a virtue of a final judgment or order of any competent tribunal of civil or criminal jurisdiction, the officer having the legal custody of such person need not produce him unless specially ordered to do so, notwithstanding such final judgment in the cases laid down in the following article, and it shall be sufficient for him to return the *habeas corpus*, with his answer in writing, annexing the judgment or order by virtue of which the person is confined.

812. Order for the Production of Person Confined—The judge may direct that the person confined shall be produced before him, notwithstanding any final judgment, sentence, or order under which he may have been deprived of liberty, if it appears to him that from some cause expressed in the affidavit on which the *habeas corpus* was granted, or in the answer accompanying the return of the writ, this production is necessary to enable him to grant to the party the relief prayed for.

813. Writ Returnable in Twelve Hours—When—The return of a *habeas corpus* shall be made in twelve hours after its service, or sooner if it be so ordered by the writ, in every case where the place of confinement is not more than twelve miles from that to which the return is to be made.

If the person confined is at a greater distance, the time for the return shall be increased one day for every twenty miles distance, and so in proportion for shorter distances.

814. Arrest of Disobeying Respondent—When the

habeas corpus has been duly served, if the party in whose favor it has been granted is not produced within the time above fixed, the judge who issued the writ shall issue a warrant to some officer of justice, commanding him to arrest and take in charge the person who disobeyed the writ, and to bring such person before him to be proceeded against according to law.

815. His Punishment—If the person thus brought before the judge refuses to deliver the *habeas corpus* which has been served upon him, or to produce the party whom he was ordered to produce in the cases where, according to the above provisions, he might be compelled to do it, he shall be sent to prison, and shall remain there until he obeys the *habeas corpus*; and shall be condemned to pay all the costs of the proceeding, besides the action for false imprisonment which the party may institute against him.

816. Person To Be Produced—When Sick—Whenever, by reason of the sickness or infirmity of the party confined, he can not be brought before the judge without endangering his life, he who has him in confinement shall mention it in his answer on returning the *habeas corpus*; and if this fact be proved by the certificate of a physician or surgeon regularly authorized to practise, and by the declaration of two other witnesses, and the signature of the party confined, if he can write, if the answer appears to him sufficient in other respects, the judge shall repair to the place where the party is confined, if he can do it without quitting the place of holding his usual sittings, otherwise he may determine on the *habeas corpus* in the same manner as if the party was produced before him.

817. When Person is Dead—Proof—Counter Evidence—If the person confining the petitioner can not produce

him because he is dead, or through some other unavoidable accident or overpowering force, he shall mention it in his answer to the writ; but this fact, to form an excuse, must be proved in a perfectly satisfactory manner to the judge.

It is to be understood that in this case, and in every other where the person confining another is bound to make proof of the causes which prevent producing him, proof to the contrary may be offered by the person who obtained the *habeas corpus*.

818. Hearing of Imprisoned or Detained Party—If the person kept in confinement is represented before the judge, he may deny all the facts stated in the answer to the *habeas corpus*, or he may allege others on his side to show that his detention or imprisonment is illegal, or that he has a right to be set at liberty; which denials and allegations shall be made under oath.

819. Summary Hearing of Writ—The judge shall then proceed in a summary manner to hear the testimony and the reasons adduced, as well by the party confined as by the party confining, and shall pronounce on the whole subject as the nature of the case may require, and according to the rules hereafter established.

820. Committal to Sheriff's Care Pending Decision—If the judge can not pronounce immediately on the *habeas corpus*, he may, until his judgment is rendered, commit the party to the sheriff of the parish where the writ is issued, or to such other person as the age of the party and other circumstances may render proper.

821. When Imprisonment Was in Civil Cause—Notice to Plaintiff—If it appear to the judge, by the return to the *habeas corpus*, or by the documents which accompany

that return, that the person whose liberation is solicited, is detained by virtue of an order rendered in a civil suit, or at the request of an individual having an interest in his confinement, the said judge shall not pronounce on the *habeas corpus*, unless it be proved to his satisfaction that previous reasonable notice in writing has been given to the plaintiff in such civil action, or to any other party interested, or his agent or attorney if they are not more than twenty miles distant from the place where the *habeas corpus* has been obtained.

822. When Writ Made Final—If it appear to the judge, from the return to the writ or from the accompanying documents, that the party is confined by the order of some tribunal, he can only restore such party to liberty in the following cases :

1. When such tribunal has exceeded its jurisdiction, as defined by law ;
2. Where the original imprisonment was lawful, but by some act, omission or event which has since occurred, the party becomes entitled to his liberty ;
3. When the order of imprisonment is deficient in some legal requisite ;
4. Where the order, although in due legal form, has been rendered in a case where the law does not allow the issuing of orders of arrest or imprisonment ;
5. Where the order is in due form, but has been rendered or executed by a person not authorized for that purpose, or where the person detaining the prisoner is not the person to whom the law has prescribed that duty ;
6. Where the order appears to have been obtained under false pretences or by corruption ;
7. Where there exists no general law, judgment, order or decree of a court of justice, if it be in a civil suit, or sentence of conviction, if in a criminal suit, to justify the imprisonment.

1. *Habeas corpus* not proper remedy to force a speedy trial.
State ex rel. Edwards vs. Sheriff, 57 A. 518.

(a) Or when mere plea of *autrefois acquit* is the issue.
State ex rel. Williams vs. Sheriff, 45 A. 316.

(b) But is proper when excessive bail is demanded.
State ex rel. Chandler praying habeas corpus, 45 A. 696.

2. A recorder of the city of New Orleans has power to determine whether prisoner arrested by his warrant is entitled to bail, and no district court can by *habeas corpus* disturb recorder in exercise of this power and itself determine question of bail.

State ex rel. Sheehan vs. Judge, 52 A. 315.

3. Jurisdiction of Supreme Court in regard to *habeas corpus* is original and it can not exercise appellate jurisdiction.

State ex rel. Cook vs. Jailor, 15 A. 247; *Ex parte* Mitchell, 1 A. 412; *Ex parte* Emanuel, 4 A. 424.

Semble, this applies only when writ used in criminal case.

Daverty vs. Duplessis, 8 M. 42; Martin vs. Ashcroft, 8 N. S. 318;
Chardon vs. Gimblotte, 1 L. 421; *Ex parte* Emanuel, 4 A. 423;
State vs. Judge, 15 L. 194.

4. *Habeas corpus* issues in civil as well as criminal cases.

Hyde vs. Jenkins, 6 L. 486.

823. Denial of Writ—When—The judge pronouncing on the *habeas corpus*, can not otherwise examine the validity or propriety of the judgment or decree of a regularly constituted tribunal under which the imprisonment has taken place; and whenever it shall appear to him that there exists sufficient legal ground for the detention of the prisoner, on account of any offence with which he may be charged, although the order of imprisonment may have been rendered in an irregular and unauthorized manner, or have been executed by a person not duly authorized for the purpose, the judge shall render a new order of arrest, in regular form, directed to the proper officer, or admit the party to bail, if the nature of the offence allows it.

824. Prisoner Liberated—When—But if it shall appear, the judge from return and annexed documents, or

otherwise, that there is no cause for arrest or confinement, or if he think that such arrest and confinement can not legally continue, he shall immediately set the prisoner at liberty.

825. To Whom Person Delivered—But if the judge decide that the party can not be released from confinement, nor admitted to bail, he shall remand him to prison, or place him under the same custody in which he was, if the detention was legal; otherwise he shall place him in the custody of the person to whom the law confides such duties.

826. Re-arrest and Imprisonment—When—Criminal Cause—A party discharged from imprisonment under a *habeas corpus*, in a criminal proceeding, through deficiency of proof, or some important defect in the warrant of imprisonment, may be arrested and confined anew, on satisfactory proof and under a legal warrant, although it be for the same offence.

827. Same Continued—Civil Cause—So also in a civil suit, a party who has been released on account of illegality of the warrant under which he is confined, or want of authority in the person confining him, may be arrested anew and imprisoned for the same cause of action, provided it be done in a legal manner.

SECTION II.

Of Other Orders Which Courts of Justice May Render.

828. Besides the *habeas corpus*, there are four other species of orders which courts of justice may issue, to-wit:

1. Mandamus—The order directing the performance of some specific act; (writ of mandamus.)

2. **Prohibition**—The order forbidding further proceedings in a suit; (writ of prohibition.)

3. **Certiorari**—The order of which the object is to pronounce on the validity of a judicial proceeding; (writ of *certiorari*.)

4. **Quo Warranto**—The order of which the object is to prevent an usurpation; (writ of *quo warranto*.)

1. *What courts may issue supervisory writs:*

(a) Supreme Court.

Art. 90 of Constitution 1879.

(b) Courts of appeal in aid of their appellate jurisdiction.

Art. 104, Constitution 1879.

(c) District courts in aid of appellate jurisdiction.

C. P. 830.

2. Supreme Court, by virtue of Art. 90 of Constitution investing it with supervisory jurisdiction, may issue remedial writs, even in cases where they have no appellate jurisdiction.

State ex rel. Gas Light Co. vs. Judges, 87 A. 286; State ex rel. Hirsch vs. Judge, 89 A. 97; State ex rel. City of New Orleans vs. Judge, 82 A. 549; State ex rel. Sheehan vs. Judge, 82 A. 815; State ex rel. Fredricks vs. Skinner, Judge, 83 A. 146; 83 A. 182; State ex rel. Chism & Boyd vs. Judge, 84 A. 1178; State ex rel. Murray vs. Judge, 86 A. 581.

3. Other courts may issue remedial writs, but only in aid of their appellate jurisdiction.

Constitution, Art. 104; State ex rel. Gas Light Co. vs. Judges, 87 A. 286; State ex rel. Hirsch vs. Judge, 89 A. 97; State ex rel. Rocchi vs. Judge, 45 A. 588.

4. Under previous Constitutions, and Code of Practice, Art. 839, Supreme Court as well as all others could issue remedial writs only in cases where they had appellate jurisdiction.

State ex rel. Padron vs. Judge, 81 A. 795; State vs. Judge, 15 A. 120; State ex rel. Chism & Boyd vs. Judge, 84 A. 1178; Bush vs. Head, 72 A. 469; State ex rel. Caballero vs. Judge, 25 A. 881; State ex rel. Henry vs. Judge, 8 A. 288; Succession of Whipple, 2 A. 287; *Ex parte* Bujol, 8 A. 716; Succession of McCarty, 2 A. 979; Laverty vs. Duplessis, 8 M. 42; State vs. Watts, 8 L. 76; State vs. Judge, 11 R. 285; State vs. Judge, 7 A. 184; State ex rel. Taylor vs. Judge, 26 A. 121; State ex rel. D'Meza vs. Judge, 21 A. 128; 8 A. 92. See also, 2 L. 89; 8 L. 90; 14 L. 488; 8 M. 42; 19 L. 478; State vs. Judge, 17 A. 282.

§ 1.

Of the Order Directing the Performance of Some Specific Act, (Writ of Mandamus.)

829. Mandamus—This is an order issued in the name of the State by a tribunal of competent jurisdiction, and addressed to an individual or corporation, or court of inferior jurisdiction, directing it to perform some certain act belonging to the place, duty or quality with which it is clothed.

(A) Not a writ issuing as of right:

Must be in strict conformity to law.

State ex rel. Fernandez vs. Judge, 84 A. 878; State ex rel. New Orleans vs. R. R. Co., 87 A. 581; State ex rel. Murray vs. Judge, 88 A. 878; State ex rel. Nicholson vs. Judge, 87 A. 848.

(B) Concurrence of majority of judges:

1. Not necessary to mere allowance of writ.

State ex rel. Southern Bank vs. Judge, 32 A. 581; State ex rel. Behn vs. Judge, 85 A. 1075.

2. But is necessary when writ is made peremptory.

State ex rel. Newman vs. Judge, 32 A. 207; School Directors vs. Conway, 24 A. 133.

(C) Usual delays:

1. Necessary to render final judgment making mandamus peremptory.

State ex rel. School Directors vs. Conway, 34 A. 133; State ex rel. Newman vs. Judge, 32 A. 207; State ex rel. Gerson vs. Judge, 37 A. 32; Regan vs. Washburn, 89 A. 1071.

2. And so with other writs except certiorari when operating as habeas corpus.

State ex rel. DeBuys vs. Judges, 32 A. 1264.

3. And mandamus of lower court is a final judgment, reviewable only on appeal or action of nullity—not on rule to quash.

State ex rel. School Directors vs. Conway, 24 A. 132.

(D) Issues in name of State:

Writ runs in name of State and petition usually is in name of State, but absence of that formality in petition is not fatal.

State ex rel. Dardeane vs. Judge, 32 A. 1268; Makain vs. Judge, 31 A. 793; Morris vs. Wombie, 30 A. 1312; Watts, Templeton et al. v. Police Jury, 11 A. 141.

(E) Mandatory injunction will not supply place of mandamus, as where prayer is for mandatory injunction to compel mayor and administrators of New Orleans to budget judgment and provide payment.

State ex rel. Carondelet, etc., vs. Mayor, 80 A. 182; Barret vs. City, 88 A. 542.

(F) Codal provisions as to mandamus broader than common law.

State ex rel. Barbin vs. Secretary of State, 82 A. 579; Hatch vs. City Bank, 1 R. 470.

(G) Who may sue out mandamus:

Inhabitants of parish to compel police jury to provide new court house according to law.

Watts vs. Police Jury, 11 A. 141.

(H) Who can not sue out mandamus:

1. Clerk of court to compel bringing of suit before his court.

State ex rel. Byerly vs. Walton, 24 A. 116.

2. Mere private individual suing to enforce a contract with the State.

State ex rel. Guaranty Co. vs. Auditor, 88 A. 887.

(I) Mandamus premature until respondent has refused to do thing demanded.

State ex rel. Pinao vs. Mount, 21 A. 852; State ex rel. Howard vs. Treasurer, 22 A. 298; State ex rel. Hillman vs. Treasurer, 24 A. 16; State ex rel. Avery vs. Mount, 21 A. 869.

(J) Mandamus continued against successor of public officer.

Bassett vs. Babin, 11 A. 672; State ex rel. Fisk vs. Police Jury, 89 A. 979; State ex rel. Canal Co. vs. City, 85 A. 68.

830. Object of Mandamus—When Writ Will Issue—
Trial in Chambers—The object of this order is to prevent a denial of justice, or the consequence of defective police, and it should therefore be issued in all cases where the law has assigned no relief by the ordinary means, and where justice and reason require that some mode should exist of redressing a wrong, or an abuse of any nature whatever.

Judges of district and parish courts shall have the right to try a mandamus in chambers during the recess of said courts.

(A) *When writ will not issue:*1. Will not issue where it would prove unavailing—*e. g.*:

(a) Where treasurer has no money to pay warrants.

State ex rel. Hillman vs. Treasurer, 24 A. 16; State ex rel. Fazende vs. City, 35 A. 221; State ex rel. Lynne vs. Administrator, 27 A. 167; State ex rel. Administrators vs. Treasurer, 5 A. 460; State ex rel. Leon vs. Geler, 35 A. 1149; State ex rel. Merle & Chapuis vs. Dubuclet, 26 A. 127; State ex rel. Howard vs. Board, 22 A. 298.

But treasurer may be ordered to register claims.

Barrow vs. Fisher, 30 A. 517.

(b) Where revenues of year have already been appropriated, as shown by budget of the city.

State ex rel. Samory vs. City, 34 A. 463.

(c) Where process could not be enforced.

Bassett vs. School Directors, 9 A. 512.

2. Will not issue where there is remedy by appeal.

Logan vs. Judge, 19 A. 4; 21 A. 143; 26 A. 146; *Ex parte* Bujol, 3 A. 716; State vs. Judge, 17 A. 283; State ex rel. Gonegal vs. Judge, 17 A. 328; State ex rel. Bryant vs. Judge, 36 A. 112; State ex rel. Pflug vs. Judge, 35 A. 765; 39 A. 664; 43 A. 984; 12 A. 342; 8 A. 239; Zimmerman vs. Judge, 34 A. 653; 8 A. 716; 4 A. 427; 9 A. 522, 260; 9 A. 513; State ex rel. Wise vs. Taylor, 32 A. 978; State ex rel. N. O. vs. Judge, 32 A. 349; State ex rel. Padron vs. Judge, 31 A. 794; State ex rel. Beebe vs. Judge, 28 A. 905; State ex rel. Halphen vs. Hudspeth, 38 A. 97; State ex rel. Gill vs. Tissot, 34 A. 90; State ex rel. Horsch vs. Judge, 33 A. 238; State ex rel. R. R. Co. vs. Judge, 36 A. 335; State ex rel. Luminas vs. Judge, 34 A. 1114; State ex rel. Logan vs. Judge, 16 A. 195; State ex rel. Nolan vs. Judge, 9 A. 250; State ex rel. Macarty vs. Judge, 1 A. 979; State vs. Judge, 8 A. 92; State vs. Bermudez, 14 L. 433; State vs. Judge, 10 A. 420; 10 A. 415; 2 L. 89; 12 L. 120.

But where appeal from order refusing injunction would be ineffectual, mandamus lies to compel granting of injunction.

State ex rel. Murray vs. Judge, 36 A. 532; and see also State ex rel. R. R. Co. vs. Judge, 35 A. 213.

3. Will not issue to try right to office.

State ex rel. Jumel vs. Johnson, 29 A. 399; State ex rel. Vienne vs. Hyams, 12 A. 919; State ex rel. Sernberg vs. Lagarde, 21 A. 19; State ex rel. Hero vs. Pitot, 21 A. 336.

(a) But this objection may be waived.

State ex rel. Ingram vs. Judge, 20 A. 530.

(b) And members of Police Board may by mandamus compel Mayor to recognize them.

State ex rel. Denis vs. Mayor, 43 A. 92.

4. Will not issue when remedy is by prohibition.

State ex rel. Johnson vs. Judge, 21 A. 113; State ex rel. Logan vs. Judge, 16 A. 185; State ex rel. Beebe vs. Judge, 24 A. 31; State ex rel. Dezutte vs. Judge, 24 A. 316.

5. Will not issue where mandamus is specially prohibited by law. Thus Act 5, E. S. of 1870, prohibits any court from entertaining any application for mandamus to compel auditor of city to issue warrant for payment of money.

State ex rel. Canal Co. vs. Mayor, 30 A. 710; Klein vs. City, 35 A. 781; 36 A. 726; State ex rel. Fernandez vs. Judge, 34 A. 875; State ex rel. Straus vs. Brown, 30 A. 79, 129; State ex rel. Monasterio vs. Administrator, 28 A. 790; State ex rel. Houston vs. City, 30 A. 82.

Aliter prior to 1870.

Pinac vs. Mount, 21 A. 352; 18 A. 196; 14 A. 249; 21 A. 370.

Act 5 of 1870 does not bar enforcement by mandamus against city of obligations specially imposed by subsequent legislation or prior contracts.

State ex rel. Asphalt Co. vs. City, 40 A. 805; 102 U. S. 203; 103 U. S. 358; Saloy vs. City, 33 A. 79; Carriere vs. City, 36 A. 687; State ex rel. Griffin vs. City, 33 A. 1179; State ex rel. Canal Co. vs. Pillsbury, 30 A. 129, 706; State ex rel. DeLeon vs. City, 34 A. 480, 1149; State ex rel. Klein vs. City, 35 A. 781; Marchand vs. City, 37 A. 19; Bauman vs. City, 38 A. 48.

6. And will not issue where remedy is by rule, as where cancellation of mortgages and privileges is asked.

State ex rel. Fix vs. Herron, 29 A. 848; Leverich vs. Prieur, 8 R. 97; French vs. Prieur, 6 R. 299.

But this doctrine has been overruled.

Lanaux vs. Recorder, 36 A. 975; Savage vs. Holmes, 15 A. 334; State ex rel. Debilleux vs. Recorder, 25 A. 61.

7. Will not issue where proper showing is not made, as where there is failure to charge judge with oppressive and illegal conduct, or with failure or refusal to perform duty, and where plaintiff fails to allege absence or inadequacy of other means of relief.

State ex rel. Nicholson vs. Judge, 37 A. 842; State ex rel. Murray vs. Judge, 36 A. 578; State ex rel. Fix vs. Herron, 29 A. 848; State ex rel. Nolan vs. Judge, 9 A. 250; Hatch vs. Bank, 1 R. 470; State ex rel. Glimmer vs. Judge, 33 A. 1201; State ex rel. Hirsch vs. Judge, 39 A. 97.

8. Will not issue to enforce mere *contract obligation*. Obligation must be purely *legal*.

State ex rel. New Orleans vs. R. R. Co., 37 A. 589; State ex rel. McEnery vs. Nicholls, 42 A. 222.

But obligation may still be legal, though it arise from contract under municipal ordinance.

Hayes vs. Michigan R. R. Co., 111 U. S. 237.

- N. B.—By special law, certain contract obligations of corporations with municipal corporations may be summarily enforced by mandamus. *Act 133 of 1888* is as follows:

"That in all cases where any corporation has heretofore contracted with, or may hereafter contract with, or shall be otherwise legally bound to any parish or municipal corporation in this State, with reference to the paving, grading, repairing, reconstructing or care of any street, highway, bridge, culvert, levee, canal, ditch or crossing, and shall fail or neglect to perform said contract or obligation, the said parish or municipal corporation, or any officer thereof, or any five tax-payers thereof, shall have the right to proceed by a writ of mandamus to compel the performance of said contract or obligation, or any part thereof, which writ of mandamus shall be made returnable in five days, shall be tried by preference over all other cases, without a jury, in vacation as well as in term time, and in case of an appeal shall be tried by preference in the appellate court.

Sec. 2. That in case any corporation shall fail or neglect to comply satisfactorily with any judgment against it in such a proceeding within the time therein fixed (which time shall be fixed by the court at such period within which the work can be reasonably done), it shall be the duty of the court, on contradictory motion and proof taken, in the same case, to issue a writ of distringas against said company, and to order the sheriff to do the work required to be done, and to apply the revenues and property of said company to defray the expenses incurred in executing the judgment of the court."

(a) This act is constitutional.

State ex rel. City vs. R. R. Co., 42 A. 550, 15.

(b) All conditions precedent must be complied with by the city or municipality.

State ex rel. City vs. R. R. Co., 44 A. 1026.

(c) And liability of corporation must be fixed and certain.

City vs. North Eastern R. R. Co., 44 A. 67.

9. Writ will not issue where result would be to give one creditor of Metropolitan Police Board a preference over others.

State ex rel. Howard vs. Burbank, 22 A. 298.

10. Writ will not issue to enforce payment of salary alleged to be due professor in State University, in advance of judicial determination of validity of his claim.

State ex rel. Schorten vs. Board, 81 A. 711.

And so in case of sheriff's bill when contested.

Houston vs. City, 80 A. 82.

11. Writ will not issue to Auditor to levy a tax when act directing it is unconstitutional.

State ex rel. School Directors vs. Jumel, 82 A. 60.

12. Will not issue when duty of respondent is not plainly or positively stated.

State ex rel. Comerford vs. Mayor, 45 A. 278; State ex rel. N. O. Pacific Co. vs. Nicholls, 80 A. 1217.

¶) *Discretion of defendant not controlled by mandamus: Thus, writ will not issue to control matters resting purely in the discretion of.*

1. City Treasurer.

State ex rel. Avery vs. Mount, 21 A. 869.

2. State Treasurer.

State ex rel. Mahan vs. Judge, 22 A. 602.

3. Or Auditor.

Longstreet vs. Johnson, 28 A. 982.

4. Police Jury.

State ex rel. Bonnabel vs. Police Jury, 22 A. 611; State ex rel. St. Martin vs. Police Jury, 29 A. 148; State ex rel. Daboval vs. Police Jury, 39 A. 769; State ex rel. Davis vs. Police Jury, 43 A. 1009.

5. Directors of corporations: as to time and manner of collecting stock subscriptions.

State ex rel. Scully vs. R. R. Co., 28 A. 888.

6. City Council:

As to amount to be appropriated for Board of Health.

State ex rel. Board vs. City, 57 A. 894.

7. Board of Liquidation.

State ex rel. Smith vs. Board, 28 A. 898; State ex rel. Forstall vs. Board, 29 A. 690; State ex rel. Burnett vs. Warmoth et als., 23 A. 76, 898; State ex rel. Bank vs. Board, 27 A. 660; State ex rel. Bank vs. Board, 29 A. 264.

8. Collectors of revenue, who have discretion as to propriety of bringing suits for taxes.

State ex rel. Hyerly vs. Walton, 24 A. 115.

9. Inferior judge.

State ex rel. Gilmer vs. Judge, 83 A. 1201; State ex rel. Selles vs. Judge, 83 A. 1264; State ex rel. Unbehagen vs. Judge, 85 A. 365; State ex rel. New Orleans Gas Light Co. vs. Mayor, 82 A. 268; *Ex parte* DeGroot, 6 Wall. 497; *Ex parte* Myra Clark Whitney, 18 Pet. 404; *Ex parte* Hoyt, 8 Pet. 590; *Ins. Co. vs. Adams*, 9 Pet. 578; *Seddau vs. Templeton*, 7 A. 126; *Bank vs. Webre*, 44 A. 1081.

10. Governor of State.

State ex rel. Mississippi Valley Navigation Co. vs. Warmoth, 24 A. 851; State ex rel. Olivier vs. Warmoth, 22 A. 1; *Mississippi vs. Johnson*, 4 Wall. 475; State ex rel. Burnett vs. Warmoth, 23 A. 77.

11. Organized church with proper judicatory—when it expels a member after hearing.

State ex rel. Soares vs. Hebrew Congregation, 31 A. 205; State ex rel. Vierra vs. Lusitanian Society, 15 A. 78; Watson vs. Jones, 13 Wall 679.

12. District attorney, in bringing suits in name of parish or State.

Farrar vs. Steele, 31 A. 640.

13. And so of Attorney General, to compel him to bring suit to forfeit charter of corporation.

State ex rel. Lannes vs. Attorney General, 30 A. 954; Bank vs. Dossin, 13 L. 497.

But *aliter* in cases of intrusion into office.

21 A. 655, 710; 22 A. 847; 23 A. 787; 24 A. 149.

(C) Ministerial duty enforced by mandamus:

Thus mandamus lies against following officers for the following purposes:

1. To parish treasurer, to pay expert's fees fixed by court.
State ex rel. Dardenne vs. Judge, 33 A. 1356; Barrow vs. Treasurer, 30 A. 514.
2. To comptroller of city, when his duty is purely ministerial.
State ex rel. Pinac vs. Mount, 21 A. 353.
3. To clerk of court:

- (a) To deliver copy of judgment legally final.

State ex rel. Fairchild vs. Stillman, 31 A. 162.

- (b) To surrender books, papers, records, etc., to his successor.

State ex rel. Wrotnowski vs. Brian, 21 A. 186.

But title to office can not be tried in such a proceeding.

State ex rel. Jumel vs. Johnson, 29 A. 399; State ex rel. Vienne vs. Hyams, 12 A. 719; State ex rel. Sternberg vs. Lagarde, 21 A. 18; State ex rel. Hero vs. Pitot, 21 A. 396.

- (c) Or to remove archives to lawful parish seat.

Police Jury vs. Miscar, 24 A. 834.

- (d) To prepare transcript.

U. S. vs. Gomez, 8 Wall. 752.

But writ does not lie to compel clerk to issue a *fi. fa.* when no judgment exists as a basis therefor.

Compton vs. Airlal, 9 A. 496.

4. To levee commissioners, to levy a tax; but where the corporation is extinct, mandamus to another like corporation with different territorial limits will be denied.

Backley vs. Commissioners, 38 U. S. 258.

5. To recorder of mortgages, to cancel and erase privileges and mortgages.

Lanaux vs. Recorder, 36 A. 375; 29 A. 146; 26 A. 61; *Deblieux vs. Recorder*, 25 A. 61; *Savage vs. Holmes*, 15 A. 334; 11 R. 54; 8 R. 193.

- (a) But see *contra*:

State ex rel. *Fix vs. Herron*, 29 A. 848; *Leverich vs. Prieur*, 8 R. 97; *French vs. Prieur*, 6 R. 292.

- (b) And where lien holders are not made parties.

State ex rel. *Fix vs. Herron*, 29 A. 848.

- (c) And summary remedy by mandamus not proper where object is to cancel registry of title to property.

Willis vs. Wasey, 41 A. 694; *Raymond vs. Villere*, 42 A. 468.

6. To district attorney, to bring suit under intrusion into office act to test right to an office.

Berhill vs. Fisk, 24 A. 149; *Hayes vs. Thompson*, 21 A. 656; State ex rel. *Rills vs. Lynch*, 28 A. 786.

7. To register of voters, to appoint commissioners and clerk of elections from opposing parties as required by law.

State ex rel. *Patton vs. Judge*, 40 A. 590.

8. To corporation:

- (a) To transfer shares on its books.

State ex rel. *Plaisent vs. R. R. Co.*, 33 A. 312.

- (b) To issue certificate of shares to owner in lieu of lost one.

Phillips vs. Gas Light Co., 25 A. 418.

9. To municipal corporations, to make elections as required by charter.

State ex rel. *Mayor vs. Judge*, 35 A. 637.

10. To mayor:

- (a) To grant commission to officer.

Hubert vs. Auvray, 6 L. 595.

- (b) To grant appeal from fine imposed by him under ordinance.

State ex rel. *Cremonini vs. Judge*, 34 A. 1197.

- (c) To recognize lawful members of the Board of Police.

State ex rel. *Denis vs. Mayor*, 43 A. 103; State ex rel. *Nicholls vs. Mayor*, 41 A. 156.

- (d) But mandamus does not lie to compel signing contract which has been annulled.
State ex rel. O'Hara vs. Heath, 20 A. 518; 26 A. 522.
11. To board of directors of bank, to admit other directors.
Prieur & Labatut vs. President et als., 7 L. 519.
12. To police Jury:
- (a) To pay over to School Board money erroneously in hands of parish treasurer.
State ex rel. Leche vs. Grier, 35 A. 1148.
- (b) To provide for new court house when required by law.
Watts, Templeman et al. vs. Police Jury, 11 A. 141.
- (c) To levy a tax to pay judgment, but a second tax will not be ordered until first tax is fully collected or its collection impossible.
Duperier vs. Police Jury, 8 A. 709.
- But no mandamus lies to levy a tax when relator has no contract as a basis of claim.
Fisk vs. Police Jury, 34 A. 41.
13. To Secretary of State, to make compilation and promulgation of election returns upon returns and tally lists of returning officers.
State ex rel. Barbin vs. Secretary, 32 A. 579; *State ex rel. Bienvenue vs. Wrotnowski*, 17 A. 156; *Hammerick vs. Hunter*, 14 A. 225; *Parker vs. Robertson*, 14 A. 225.
14. To Governor of State, when his duties are purely ministerial, but not where slightest element of discretion is vested in him.
State ex rel. Hope & Co. vs. Board, 42 A. 647; *State ex rel. Olivier vs. Warmoth*, 22 A. 1.
15. To Board of Assessors, to place property on their lists at valuation lawfully fixed.
State ex rel. City vs. Board, 30 A. 261.
16. To State Treasurer:
- (a) To stamp bonds under provisions of debt ordinance of Constitution 1879.
State ex rel. Ecuyer vs. Burke, 33 A. 962.
- (b) To pay out money properly appropriated.
State vs. Bordelon, 6 A. 68.

(c) To pay warrants in proper cases.

Ecuyer vs. Burke, 33 A. 969; *State ex rel. Longstreet vs. Treasurer*, 28 A. 967; *State ex rel. Merle vs. Treasurer*, 26 A. 137; 14 A. 221; *Baldwin vs. Dubuolet*, 27 A. 29; *University vs. Burke*, 35 A. 457.

(d) But no mandamus lies against treasurer to pay warrants:**(a1) When warrant has not been drawn.**

State ex rel. Pinao vs. Mount, 21 A. 352.

(b1) When general fund is inadequate to pay all warrants on it.

State ex rel. Boyer vs. Treasurer, 32 A. 177.

(c1) When funds warranted on are not yet in hands of treasurer.

State ex rel. Hillman vs. Dubuolet, 24 A. 16; *State ex rel. Howard vs. Board*, 22 A. 298.

(e) Nor will mandamus lie where suit is really against the State without legislative consent.

State ex rel. Hart vs. Burke, 33 A. 498; *Attorney General vs. Lazarus*, 40 A. 858; *Louisiana vs. Jumel*, 107 U. S. 728; *State vs. Burke*, 34 A. 548.

17. To Auditor of Public Accounts:**(a) To draw warrants in proper cases involving no discretion.**

State vs. Bordelon et als., 6 A. 68; *State ex rel. McCurley vs. Auditor*, 27 A. 429; *U. S. ex rel. Stokes vs. Kendall*, 12 Peters, 524; *State ex rel. Moss vs. Jumel*, 31 A. 142; *State ex rel. Campbell vs. Steele*, 37 A. 353; *State ex rel. Collens vs. Jumel*, 30 A. 861; *Mentz vs. Auditor*, 28 A. 47; *Printing Co. vs. Clinton*, 28 A. 72.

(b) Aliter where there are no funds on hand to pay.

State ex rel. Syme vs. Calhoun, 27 A. 167.

18. To Register of land office:**To prepare papers for patents, etc.**

State ex rel. McEnery vs. Nicholls, 42 A. 203.

19. To election officers:**Directing the holding of proper election provided by law.**

State ex rel. Mayor vs. Judge, 35 A. 687; *State ex rel. Denis vs. Mayor*, 43 A. 104.

20. To city treasurer of New Orleans:**(a) To place judgment duly registered with comptroller on next annual budget after registry.**

State ex rel. Carondelet Navigation Co. vs. Mayor, 30 A. 707; *Id. vs. Id.*, 30 A. 129; 37 A. 529; 38 A. 43.

- (b) But it is not the duty of treasurer and comptroller to levy a separate tax to pay such registered judgments. They have a discretion—not to be controlled by mandamus—to pay judgments from funds set apart for contingent expenses.

State ex rel. Carondelet Navigation Co. vs. Mayor, 30 A. 128.

- (c) And where judgment is null and void on face, it cannot be budgeted under mandamus.

State ex rel. Canal Co. vs. City, 35 A. 68.

- (d) No creditor since Act 5 of 1870 can obtain mandamus to auditor to warrant and to treasurer to pay warrant whether his claim be liquidated or unliquidated.

State ex rel. Straus vs. Brown, Administrator, 30 A. 78; Eugene vs. City, 36 A. 777.

- (e) Previous to Act 5 of 1870, mandamus frequently resorted to in order to compel comptroller and treasurer to respectively warrant and pay registered claims against city.

State ex rel. Avery vs. Mount, 21 A. 369; State ex. rel. Pinew. Mount et al., 21 A. 352; Shaw vs. Huvell, 18 A. 136; Parker, Sheriff, vs. Robertson, Auditor, 14 A. 249.

- (f) And mandamus lies against treasurer to turn over to Board of Liquidation all property not dedicated to public use.

State ex rel. Board of Liquidation vs. City, 36 A. 524.

21. To Board of Liquidation. To compel or prohibit funding evidences of State indebtedness.

30 A. 816; 30 A. 1356; 31 A. 278; Meyers vs. Board of Liquidation, 31 A. 124; 39 A. 527; 39 A. 848; 39 A. 895; 40 A. 521; 40 A. 573.

22. To sheriff to release a slave from imprisonment.

Ney vs. Richard, 15 A. 608.

23. To recorder in New Orleans:

- (a) To compel allowance of appeal in proper cases.

Stinson vs. Recorder, 41 A. 528.

But not in unappealable cases.

39 A. 841.

- (b) To compel recorder to examine accused, though investigation also be pending before a grand jury.

Matranga vs. Recorder, 42 A. 1091.

(D) *To what officers writ directed: writ directed to those who alone can obey it:*

1. Mayor not mandamused to do what pertains to council.
State ex rel. Kneeland vs. Shreveport, 29 A. 658.
2. Nor assessor and tax collector to assess a tax. Proper defendant is police jury.
State ex rel. Nelson vs. Fournet, 80 A. 1108.
3. Nor will comptroller and treasurer be ordered to perform duty imposed on council.
State ex rel. Asphalt Co. vs. City, 40 A. 299.
4. Nor can Board of Levee Commissioners be mandamused to collect a tax; their functions and powers being confined to its levy.
Galther vs. Tax Collector, 40 A. 868.

(E) *Summary trial of mandamus:*

Mandamus entitled to summary trial, but opposite party must have notice.
Savage vs. Holmes, 15 A. 835; 15 A. 173.

(F) *Trial in vacation:*

Only district courts can try mandamus in chambers during vacation.
State ex rel. Southern Bank vs. Judge, 22 A. 581.

831. Other Relief No Bar—When—This order may be issued at the discretion of the judge, even when a party has other means of relief, if the slowness of ordinary legal forms is likely to produce such a delay that the public good and the administration of justice will suffer from it.

832. To Individuals, Corporations or Judges—This order may be directed to individuals, whether holding offices or not, to corporations and to judges of inferior tribunals.

833. To Individuals or Officers—When—It may be directed to a simple individual, as to the heirs or other legal representatives of a deceased public officer, or to such officer himself, if he be alive, or has resigned, or been re-

moved, to compel them to deliver to the successor of such officer the papers and other effects belonging to his office.

State ex rel. Wrotnowski vs. Bryan, 21 A. 186.

834. To Public Officers—It may be directed to public officers to compel them to fulfil any of the duties attached to their office, or which may be legally required of them.

Mandamus lies only to the public officer who has the power of obeying.

Thus, mandamus will not issue to mayor when thing demanded lies only in power of common council.

State ex rel. Kneeland vs. Judge, 29 A. 659.

835. To Corporations—When—It may be directed to all corporations established by law:

1. To Make Elections—To compel them to make elections and perform the other duties required by their charter.

2. To Recognize Rightful Members—To compel them to receive, or restore to their functions, such of their members as they shall have refused to receive, although legally chosen, or whom they shall have removed without sufficient cause.

836. By What Courts Issued—This order, in all the above mentioned cases, can only be issued by courts whose jurisdiction in civil matters exceeds one hundred dollars, exclusive of interest.

Petition for mandamus must show matter involving enough to give court jurisdiction.

State vs. Judge, 7 A. 184; *Plique vs. Bellome*, 2 A. 298; *State vs. Judge*, 7 A. 289.

837. To Judges—When—It may be directed more particularly to judges of inferior courts, commanding them to render justice and to perform the other duties of their office conformably to law.

(A) To what courts mandamus lies:

1. To court of appeals in proper cases—*e. g.*, to try case rightfully within their jurisdiction.

State ex rel. Harper vs. Judge, 83 A. 1096; State ex rel. Winter & Hunter vs. Judges, 83 A. 1096; Lemle vs. Ronton, Sheriff, 83 A. 1005; State ex rel. Ins. Co. vs. Mayo, 83 A. 1070; State ex rel. Cobb & Gunby vs. Judges, 82 A. 744; state ex rel. McGee, Snowden & Violet vs. Judges, 83 A. 183; State ex rel. Gilmer vs. Judges, 83 A. 1201; 87 A. 109; 83 A. 358.

But not when said court finds on examination that the claim is inflated to give jurisdiction.

State ex rel. Baucoudray vs. Judge, 41 A. 1018.

(B) Mandamus lies to lower judge:

1. To compel him to grant suspensive appeal in proper cases.

State ex rel. Police Board vs. Judge, 31 A. 741; 40 A. 607; State ex rel. Jorda vs. Judge, 29 A. 776; State ex rel. R. R. Co. vs. Judge, 84 A. 864; State ex rel. Upton vs. Judge, 87 A. 830; State ex rel. Bell vs. Judge, 86 A. 886; State ex rel. Fassman vs. Judge, 22 A. 200; Bagur vs. Judge, 24 A. 599; 39 A. 341; State ex rel. Dardenne vs. Judge, 28 A. 889; Coons vs. Judge, 23 A. 29; State ex rel. Crescent City Bank vs. Judge, 17 A. 186; 22 A. 200; 23 A. 29; 21 A. 85; 41 A. 1140; 85 A. 745; 85 A. 212; 85 A. 887; 86 A. 210; 86 A. 301; 24 A. 599, 786; 22 A. 90; 23 A. 718; 22 A. 119, 120; 86 A. 981.

And pendency of mandamus to compel allowance of appeal suspends prescription of appeal.

Ready vs. City, 27 A. 170; but see C. P. 598, (A) No. 7.

2. To probate a will.

State ex rel. Remendo vs. Judge, 17 A. 189.

3. To try or decide case, where he has jurisdiction and refuses to act.

State ex rel. Merchants' Ins. Co. vs. Judges, 83 A. 1070; State ex rel. Winter & Hunter vs. Judge, 83 A. 1096; State ex rel. McGee, Snowden & Violet vs. Judges, 83 A. 180; State ex rel. Cobb & Gunby vs. Judges, 82 A. 774; State ex rel. Harper vs. Judges, 83 A. 358; State ex rel. Gilmer vs. Judges, 83 A. 1201; 25 A. 150, 227; 27 A. 702; 80 A. 156; 4 R. 227; State ex rel. Isaacson vs. Judge, 84 A. 74; State ex rel. Ohapman vs. Judge, 20 A. 580; State ex rel. Tooreau vs. Judge, 17 A. 252.

4. To try and decide exception tending to dismiss the suit, as plaintiff's right to sue.

State ex rel. Marks vs. Judge, 82 A. 296.

5. To grant an injunction in cases involving no discretion—*e. g.*, in cases stated in C. P. 298 to 302.

State ex rel. Jacobs vs. Judge, 40 A. 206; State ex rel. Gaynor vs. Judge, 88 A. 924; New Orleans vs. Telegraph Co., 87 A. 571; State ex rel. Murray vs. Judge, 86 A. 578; Beebe vs. Guinault, 29 A. 736.

(a) But not where proper showing is not made.

State ex rel. Nicholson vs. Judge, 57 A. 842.

(b) Or where element of discretion appears.

State ex rel. Raymond vs. Judge, 41 A. 951.

6. To decide a case if he fail to do so within reasonable time.

Delay of five months amounts to denial of justice.

State ex rel. Martin vs. Judge, 57 A. 610; Life Ins. Co. vs. Adams, 9 Peters, 605; State vs. Judge, 14 L. 483; State vs. Judge, 4 R. 51; State vs. Judge, 4 R. 227; State ex rel. Woods vs. Judge, 27 A. 702; State ex rel. Turpin vs. Judge, 13 A. 481; Life and Fire Ins. Co. vs. Heirs of Wilson, 8 Pet. 291; State ex rel. Meesteyer vs. Judge, 35 A. 528.

Act 72 of 1884, p. 94., provides that district judges and judges of city courts must decide cases within thirty days after submission.

7. To compel execution of mandate of Supreme Court.

Cox' Executors vs. Thomas, 11 L. 369; Sentell vs. Judge, 38 A. 32.

8. To compel signing of bill of exception.

State vs. Judge, 18 A. 484; *Ex parte* Crane, 5 Peters, 190; *Ex parte* Bradstreet, 4 Pet. 102; State ex rel. Mullen vs. Judge, 32 A. 1043; State ex rel. Wyly vs. Judge, 35 A. 248; Broussart vs. Trahan, 3 M. 714; State vs. Gunter, 30 A. 536; 17 A. 267; 26 A. 67.

9. To compel judge to try case alone when no jury allowed by law.

State ex rel. Ohism & Boyd vs. Judge, 34 A. 1177.

And generally when he declines to try the case on an erroneous determination of a question of practice preliminary to whole case.

Id.; High, Ex. Rem., Sec. 151; *Ex parte* Bradstreet, 7 Peters, 624; U. S. vs. Judge Peters, 5 Cranch, 115; State ex rel. Cohen vs. Judge, 41 A. 41.

10. To compel judge *ad hoc* to try case when he is willing to act in case.

State ex rel. Perche vs. Judge, 35 A. 603.

But not where judge *ad hoc* declines to sit on case at all, or where his appointment is contested.

See chapter on "Recusation;" State ex rel. Perche vs. Judge, 35 A. 603; State ex rel. Fuqua vs. Judge, 29 A. 816.

11. To compel judge to certify a record.

Baas vs. Barton, 12 L. 438.

12. To compel probate judge to appoint an under-tutor and order a family meeting.

State vs. Judge Bermudez, 14 L. 479; but see State ex rel. Millaudon vs. Judge, 15 A. 113; State ex rel. Turpin vs. Judge, 13 A. 481; State ex rel. Simmons vs. Judge, 13 A. 483.

13. To compel judge to reduce to writing, and sign and enter of record for appeal, if proper, his judgment of refusal to receive special mortgage of tutor and annul general mortgage.

State ex rel. Castille vs. Judge, 15 A. 164.

14. To compel judge to allow writ of execution.

Stafford vs. Bank of Louisiana, 17 How. 275.

15. To sign judgment.

State ex rel. R. R. Co. vs. Judge, 35 A. 218; State ex rel. Dixon vs. Judge, 26 A. 119.

But not where a motion for new trial is pending.

State ex rel. Wentz vs. Judge, 35 A. 373.

16. To allow bonding proceeds of attached property sold *in limine*.

State ex rel. Bloch & Bro. vs. Judge, 44 A. 89.

17. To hold terms of court at proper parish or county seat.

State ex rel. Police Jury vs. Judge, 43 A. 127.

18. To restore attorney wrongfully debarred.

Ex parte Bradley, 7 Wall. 364.

(C) Mandamus does not lie to lower judge:

1. To compel him to decide exceptions referred to merits.

State ex rel. Bryant vs. Judge, 36 A. 112.

2. To compel issuance of injunction in cases where he has discretion.

State ex rel. Savage vs. Judge, 38 A. 916; State ex rel. Beebe vs. Judge, 28 A. 905; Bank vs. Webre, 44 A. 1081.

But in certain cases he has no discretion and must issue.

Murray vs. Judge, 36 A. 578.

3. To compel him to grant appeal from mere interlocutory judgment causing no irreparable injury though such interlocutory judgment be signed.

State ex rel. Pfug vs. Judge, 35 A. 766; 23 A. 212.

- (a) Or to grant suspensive appeal when none is allowable.

Schwartz vs. Judge, 41 A. 241; Commagere vs. Judge, 22 A. 116; 33 A. 269; Sternberg vs. Lagarde, 21 A. 13; Telegraph Company vs. Judge, 21 A. 723.

- (b) Or where time has expired.

Dulle vs. Judge, 41 A. 1140.

4. To control his judicial discretion not arbitrarily exercised.

- (a) As to determine legality of return of votes cast.

State ex rel. Horsch vs. Judge, 33 A. 268; *Ex parte* Slocomb, 19 How. 18; State ex rel. Blackman vs. Strong, 32 A. 173.

- (b) Or to ratify appointment of deputy sheriff.
State vs. Read, 41 A. 74.
5. To compel judge to decide in a particular manner.
State ex rel. Gougeon vs. Judge, 17 A. 328; State ex rel. Millaudon vs. Judge, 15 A. 113; State ex rel. Cupples vs. Judges, 31 A. 1016; State ex rel. New Orleans vs. Judge, 32 A. 549; 34 A. 74.
- (a) As to order judge to appoint tutor and under-tutor recommended by family meeting.
State ex rel. Turpin vs. Judge, 13 A. 481; State ex rel. Simmons vs. Judge, 13 A. 483.
- (b) As to reduce a bond for release of sequestration.
State ex rel. Benton vs. Judge, 26 A. 116.
- (c) To appoint certain persons members of a family meeting.
Succession of Bothick, 43 A. 533.
- (d) To homologate proceedings of family meeting, though he could be compelled to act one way or the other.
State ex rel. Ames vs. Judge, 32 A. 300; State ex rel. Luminais vs. Judges, 34 A. 1115; State vs. Judge, 5 R. 161; 7 A. 184.
- (e) To compel judges to approve salary for a particular amount of clerk of court when refusal to so approve is based on their interpretation of the law.
State ex rel. Luminais vs. Judges, 34 A. 1115.
6. To dissolve injunction on bond.
State ex rel. Steamship and Lottery Co. vs. Judge, 23 A. 765.
7. To compel judge *ad hoc* to try a case when the validity of his appointment is pending on suspensive appeal.
State ex rel. Perche vs. Earhart, Judge *ad hoc*, 33 A. 602.
8. To compel court of appeals to reinstate case which (having full jurisdiction) it has dismissed.
State ex rel. Forman vs. Judge, 37 A. 111.
9. To compel district judge to appoint attorney to try recusé case, when there is judge of concurrent jurisdiction, not recusé.
State ex rel. Hardenburger vs. Judge, 35 A. 1007.
10. To compel judge to issue order of seizure and sale, though he might be directed to act on application.
State ex rel. Wise vs. Taylor, 32 A. 977.
11. To compel judge to issue execution on a conditional judgment when fulfilment of potestative condition not shown in lower court.
State ex rel. Hepting vs. Judge, 38 A. 553.

12. To compel judge to rescind order dismissing an appeal for insufficiency of surety.

State ex rel. Menge vs. Judge, 26 A. 200; 21 A. 44.

(D) *Mandamus lies to officers exercising quasi judicial functions.*

1. *Funding Board* may be mandamused to fund interest and principal of judgment against Charity Hospital.

State ex rel. Smith & McKenna vs. Board, 34 A. 197.

2. *Mayor of city* may be mandamused to grant suspensive appeal from judgment rendered by him fining offender under ordinance charged with unconstitutionality.

State ex rel. Cremonini vs. Judge, 34 A. 1197.

838. To Judges—When—In this case, the order (or writ of mandamus) issues not only when the judges of inferior courts are guilty of a denial of justice, unreasonable delay in pronouncing judgment on causes before them, but also if they refuse or neglect to perform any of the duties required of them by law, or which may enable the superior courts to exercise their appellate jurisdiction.

839. Restriction as to Appellate Jurisdiction—It is only the court which exercises appellate jurisdiction over an inferior court, that can direct to the latter an order to perform any of the duties belonging to it.

The restriction in this article is removed *quoad* Supreme Court by Art. 90 of Constitution.

See O. P. 528, "A."

840. Petition and Oath—The party wishing to obtain an order in any of the cases mentioned in this paragraph, must apply to any competent tribunal by petition, stating the nature of his right, or of the injury he sustains, or of the denial of justice which he experiences, and shall make oath of the truth of the facts thus alleged.

1. Application for writ must be by petition—not by answer.

Bishop vs. Marks, 15 A. 147.

2. Prayer for order commanding is equivalent to prayer for mandamus.

State ex rel. Dardenne vs. Judge, 28 A. 1858.

3. In the United States Supreme Court, practice for obtaining mandamus is to proceed by rule.

Ins. Co. vs. Adams, 9 Peters, 571.

4. *Affidavit*. Oath necessary, and want of it is not cured by affidavit to supplemental petition.

Fisk vs. Police Jury, 33 A. 29; *Bishop vs. Marks*, 15 A. 147; *Leland vs. Rose*, 10 A. 415; *U. S. vs. Triggs*, 11 F. 173; *Ex parte Poultney*, 12 F. 67; 31 A. 302.

841. Alternative Writ—The court to which the complaint is addressed, if it thinks there is ground for interposing its authority, shall issue an order, addressed to the party or to the inferior judge against whom the complaint is made, by which he shall be directed to do what has been demanded of him, or show cause to the contrary, within a certain time after the service of the order, to be fixed by the court.

(A) Return of respondent:

1. Plaintiff may traverse same or may rely upon its insufficiency upon the face of the papers.

State ex rel. Vierra vs. Judge, 15 A. 73.

2. Untraversed return is accepted as true.

Soares vs. Hebrew Congregation, 30 A. 209.

3. Return should contain full defence.

Bienvenu vs. Wrotnowski, 17 A. 156; *Savage vs. Holmes*, 15 A. 334; *Shaw vs. Howell*, 18 A. 196.

(B) Trial summary, id.

842. Return or Answer to Writ—If, on the day assigned for answering the order, the party or judge to whom it is directed answers and states sufficient reasons to justify his conduct, the complaint shall be dismissed, and the petitioner sentenced to pay costs.

1. Return to mandamus: traverse:

Applicant may traverse on trial of merits without formal replication; or applicant may rely upon legal insufficiency of return.

State ex rel. Vierra vs. Lusitania Society, 15 A. 73; 5 A. 294.

2. Answer to mandamus should contain full written defence, whether it involve exceptions or merits.

Shaw vs. Howell, 18 A. 186; 81 A. 802.

843. When Answers Insufficient—Peremptory Writ—

But if the answer is considered insufficient, then a peremptory mandate shall issue, ordering the party or inferior judge to do what has been demanded of him, and if he does not obey, an order of arrest shall issue, and he shall be imprisoned until he has rendered obedience to the mandate.

26 A. 88.

(A) Enforcement of mandamus:

1. Obedience to mandate not enforced by *steri facias* though mandate order respondent to pay over certain sum.

State ex rel. Board of Police vs. Judge, 21 A. 741.

2. Mandamus against judge enforced by imprisonment.

State ex rel. Martin vs. Judge, 87 A. 614; State vs. Williams, 7 R. 252.

3. And so against members of city council.

State ex rel. Bauman vs. Judge, 88 A. 41; Commissioners of Leavenworth vs. Sellow, 99 U. S. 623.

844. Service of Writ — Disobedience — Distringas—

When the mandate directing the performance of a specified act shall have issued against a corporation, the notice shall be served on the mayor or presiding officer of such corporation; and if the corporation or the body of directors disobey the order, it shall be punished for the contempt by the sequestration of its revenue, (writ of *distringas*,) until it yield obedience to the mandate.

§ 2.

Of the Order Forbidding Further Proceedings in a Suit (Writ of Prohibition).

845. Writ of Prohibition—This mandate only issues to courts of inferior judges which exceed the bounds of their jurisdiction.

(A) Not a writ of right:

Writ issues only on strict compliance with law and in sound discretion of court.

State ex rel. Osborn vs. Judge, 35 A. 533; State ex rel. D'Meza vs. Judge, 21 A. 123; State vs. Judge, 19 L. 133; State ex rel. Follett vs. Judge, 32 A. 1186; State ex rel. Cummings vs. Judge, 29 A. 361; State ex rel. Coons vs. Judge, 27 A. 336; State ex rel. Reid vs. Fournet, 6 A. 943.

(B) What courts will issue:

Prior to Constitution of 1879, Supreme Court could issue writ of prohibition only where it had appellate jurisdiction.

State ex rel. Foulhouse vs. Judge, 12 A. 513; State ex rel. Rocchi vs. Judge, 45 A. 532; Bush vs. Head, 22 A. 459; Hart vs. Hoss, 22 A. 317; State ex rel. Caballero vs. Judge, 25 A. 331.

After under Art. 90, Constitution 1879.

State ex rel. LeBlanc vs. Justice, 41 A. 908.

(C) To what courts writ will issue:

1. To court of appeals where it exceeds its rightful jurisdiction.

State ex rel. Millard vs. Judge, 40 A. 771.

2. To justice of the peace exceeding his jurisdiction.

State ex rel. LeBlanc vs. Justice, 41 A. 908.

846. Writ Issues from Appellate Court—It is an order rendered in the name of the State, by an appellate court of competent jurisdiction, and directed to the judge and to the party suing in a suit before an inferior court, forbidding them to proceed further in the cause, on the ground that the cognizance of the said cause does not belong to such court, but to another, or that it is not competent to decide it.

(A) Supreme court directing the writ to lower court need not be seized with appellate jurisdiction in the particular case in which the writ issues.

Art. 90 of Constitution of 1879 emancipated Supreme Court from restriction as to appellate jurisdiction.

See *ante*, "Mandamus."

(B) Courts other than Supreme Court can not issue except in aid of their appellate jurisdiction.

C. P. 346.

(C) When writ will not issue:

1. When remedy is by appeal.

State ex rel. Hernandez vs. Monroe, 83 A. 928; State ex rel. Gin Mfg. Co. vs. Judge, 84 A. 762; State ex rel. Sinnott vs. Judge, 82 A. 553; State ex rel. Berthoud vs. Judge, 84 A. 782; State ex rel. Follett vs. Judge, 82 A. 1185; State ex rel. Gill vs. Tissot, 84 A. 90; State ex rel. New Orleans vs. Judge, 86 A. 750; State ex rel. D'Meza vs. Judge, 21 A. 123; State vs. Judge, 11 A. 696; 8 A. 92; 112 A. 696; State ex rel. Zimmerman vs. Judge, 84 A. 653; State ex rel. Hans vs. Judge, 86 A. 769; State ex rel. Fairrex vs. Judge, 83 A. 927; State ex rel. Bedford vs. Judge, 2 R. 566. State ex rel. Chandler vs. Judge, 44 A. 567; State ex rel. Gooch vs. Justice, 88 A. 968; Wood & Bro. vs. Judge, 88 A. 877; Berthoud vs. Judge, 84 A. 782; State ex rel. Bothick vs. Judge, 44 A. 290; State ex rel. Morere vs. Judge, 44 A. 1100; State ex rel. Reid vs. Fournett, 45 A. 943; State ex rel. Callahan vs. Judges, 46 A.

2. Where proper remedy is by injunction, as where judge rescinds order for suspensive appeal and issues execution.

State ex rel. Clentat vs. Judge, 82 A. 1814.

3. Where jurisdiction has not been usurped—e. g.:

(a) When court has jurisdiction.

State ex rel. Walker & Merz vs. Judge, 89 A. 182; State ex rel. Patton vs. Judge 40 A. 893; State ex rel. Maxwell vs. McDowell, 48 A. 1198; State ex rel. Raymond vs. Judge, 89 A. 499; State ex rel. Wilmot vs. Judge, 27 A. 158; State vs. Judge, 20 A. 177; State ex rel. Selles vs. Judge, 38 A. 1284; State ex rel. Dardenne vs. Judge, 88 A. 1856; State ex rel. Police Jury vs. Judge, 41 A. 408; State ex rel. Weber vs. Judge, 82 A. 1092; State ex rel. Moses, Lobe & Co. vs. Judge, 85 A. 236.

(b) And jurisdiction of cause extends to all incidental questions.

State ex rel. Gin Mfg. Co. vs. Judge, 84 A. 758.

(c) Or where judge has power to act, as where one judge of Civil District Court replaces absent or sick judge of other division.

Buisson vs. Lazarus, 88 A. 1426.

(d) Where court is proceeding to hear necessary evidence to determine jurisdiction.

State ex rel. Lewis vs. Judge, 85 A. 1110; State ex rel. Fontenot vs. Judge, 88 A. 718; State ex rel. Rothany vs. Judge, 84 A. 1142; State ex rel. Hernandez vs. Judge, 88 A. 923; State ex rel. Coltharp vs. Judge, 43 A. 1186.

(e) Or where judge hears suit of creditors attacking stay of proceedings given to insolvent.

State ex rel. Williams vs. Judge, 42 A. 78.

4. Where no plea to the jurisdiction of the court was filed and overruled. Overruling of this plea is condition precedent.

29 A. 809; State ex rel. Wood & Bro. vs. Judge, 38 A. 920; State ex rel. Girardey vs. Steele, 38 A. 569; State ex rel. Larrieux vs. Judge, 29 A. 806; State ex rel. Morgan R. R. Co. vs. Judge, 37 A. 845; State ex rel. Marchand vs. Judge, 44 A. 190; State vs. Judge, 10 R. 172; State ex rel. Gin Mfg. Co. vs. Judge, 34 A. 761; State ex rel. Attorney General vs. Judge, 34 A. 611; State ex rel. Shakespeare vs. Judge, 40 A. 607; State ex rel. LeBlanc vs. Justice, 41 A. 908; State ex rel. Baker vs. Judge, 48 A. 1121.

5. But this rule is subject to exception—*e. g.* :

(a) Where clerk performs a judicial act beyond his legal powers. Technical plea to jurisdiction is impossible.

State ex rel. Boyd vs. Green, 34 A. 1027.

(b) And so when judge issues execution pending suspensive appeal.

State vs. Judge, 19 L. 174; 17 L. 511; State ex rel. Avery vs. Dufel, 41 A. 963.

6. Where application comes too late and writ is waived, as where party asks for trial on overruling of plea to jurisdiction.

State ex rel. Hans vs. Judge, 36 A. 768; State ex rel. Duthoo vs. Judge, 45 A. 218.

7. Where want of jurisdiction does not clearly appear from record.

State ex rel. Michoud vs. Judge, 20 A. 239; State ex rel. Levett vs. Lapeyrollerie, 38 A. 264; State ex rel. Commingle vs. Judge, 29 A. 860; State ex rel. Soallen vs. Judge, 45 A. 242.

8. Where writ is addressed to judge sitting as a mere commissioner to take testimony and not in judicial capacity.

State ex rel. Bedon vs. Spearing, 31 A. 122.

9. Where question of fact on which writ is based is contested.

State ex rel. Babin vs. Judge, 9 R. 490; State vs. Judge, 10 R. 109; State ex rel. Michoud vs. Judge, 20 A. 240.

10. Where act to be prohibited is already done.

U. S. vs. Hoffman, 4 Wall. 158; State ex rel. Bassetti & Churchill vs. Judge, 44 A. 1098.

11. Or where threatened action of judge no longer exists.

State ex rel. Davidson vs. Judge, 33 A. 178.

12. Where complaining party has recognized the jurisdiction of the court, of whose action in assuming jurisdiction he complains.

State ex rel. Singer vs. McGuire, 40 A. 878.

(D) *Writ sometimes issues where court has jurisdiction of the cause, but in the course thereof exceeds its lawful power—e. g. :*

1. Where court illegally issues writ of injunction against city council.

State ex rel. Behan vs. Judge, 35 A. 1085.

2. Where court illegally punishes for contempt.

State ex rel. Liversey vs. Judge, 34 A. 741.

(E) *Sole question involved is jurisdiction vel non.*

State ex rel. Attorney General vs. Judge, 34 A. 611; State ex rel. Logan vs. Judge, 16 A. 186.

(F) *Plea to jurisdiction :*

1. It is sufficient if objection to jurisdiction appears from an anterior proceedings.

State ex rel. Syme vs. Judge, 35 A. 1104.

2. Plea must have been to *jurisdiction*, not mere exception to form, no cause of action or vagueness.

State ex rel. Wood vs. Judge, 38 A. 921; Troegel vs. Judge, 35 A. 1164.

3. And such plea must have been *overruled* or *disregarded* and so alleged in application.

State ex rel. Girardey vs. Steele, 38 A. 569; State ex rel. R. R. Co. vs. Judge, 37 A. 845; State ex rel. Larrieux vs. Judge, 29 A. 906.

4. For if plea be virtually sustained, as where judgment covers only that branch of case clearly within the jurisdiction of the court, writ will be denied, even if court overruled the plea *in toto*.

State ex rel. Smith Bros. & Co. vs. Judge, 35 A. 788.

(G) *Writ of prohibition will issue to lower judge exceeding bounds of jurisdiction or legitimate powers—e. g. :*

1. When lower court wrongfully dismisses appeal :

(a) When bond is sufficient in amount.

State ex rel. Roman vs. Judge, 21 A. 443; State ex rel. Mitchell, Craig & Co. vs. Judge, 21 A. 780; State ex rel. Stackhouse vs. Judge, 21 A. 158; State ex rel. Johnson vs. Judge, 21 A. 113; State ex rel. Beebe vs. Judge, 28 A. 81.

(b) When surety is sufficient.

State ex rel. Lynne vs. Judge, 24 A. 328; State ex rel. Kane vs. Judge, 28 A. 279; State ex rel. Shropshire vs. Judge, 23 A. 491; State ex rel. Storrs vs. Judge, 21 A. 785; State ex rel. Mitchell, Craig & Co. vs. Judge, 21 A. 780; State ex rel. Stackhouse vs. Judge, 21 A. 158; State ex rel. Dezutte vs. Judge, 24 A. 816; State ex rel. Johnson vs. Judge, 21 A. 113; State ex rel. Gausson vs. Judge, 21 A. 43; State ex rel. Menge vs. Judge, 36 A. 711; Acts 1876, p. 49; 22 A. 592.

- (c) When surety becoming insolvent after appeal, another one is offered but refused and execution allowed.

Gray vs. Lowe, 9 A. 478.

- (d) *Aliter*, when surety not good.

State ex rel. Simonds vs. Judge, 21 A. 178.

2. When lower judge dismisses suspensive appeal and executes judgment, he having been divested of jurisdiction by appeal and perfection of bond.

State ex rel. Mount vs. Judge, 22 A. 37; State ex rel. Graham vs. Judge, 24 A. 596; State ex rel. Dubuclet vs. Judge, 24 A. 600; State ex rel. Beebe vs. Judge, 21 A. 81.

- (a) *Aliter* where bond not sufficient.

State ex rel. Wassel vs. Judge, 22 A. 115; State ex rel. Bankhead vs. Judge, 22 A. 85; State ex rel. Pontchartrain R. R. Co. vs. Judge, 27 A. 697.

- (b) But it seems the present doctrine is that proper remedy is by suspensive appeal from rescinding order.

State ex rel. Fairrex vs. Judge, 23 A. 929.

- (c) And only upon refusal of such appeal will execution debtor be entitled to mandamus and prohibition.

State ex rel. Cienat vs. Judge, 23 A. 814.

3. When lower judge appoints executor and allows him to act, refusing to grant suspensive appeal when there is denial of necessity of appointment of executor or administrator. Writ of prohibition is ancillary to mandamus to grant suspensive appeal.

State ex rel. Pearson vs. Judge, 22 A. 61; State ex rel. City of New Orleans vs. Judge, 22 A. 120.

4. Where execution issues against successful appellee for costs of appeal.

State ex rel. Boye vs. Duncan et als., 18 A. 102.

5. When lower judge proceeds to execute judgment which he was incompetent *ratione materiae* to render.

State ex rel. Fernandez vs. Houston, 34 A. 875; State ex rel. Saave vs. Judge, 20 A. 811; Clarke, Assignee, vs. Rosenda et al., 5 R. 27; State ex rel. Gas Light Co. vs. Judge, 27 A. 605.

6. When lower judge issues mandamus when he has no jurisdiction to do so.

State ex rel. Fernandez vs. Houston, 34 A. 875.

7. When lower judge entertains proceeding pending a suspensive appeal.

State ex rel. Pugh vs. Judge, 23 A. 1832; Larrieux vs. Judge, 26 A. 28; Gourgotte vs. Porte, 27 A. 431.

Or where suspensive appeal is asked and refused.

State ex rel. Becker vs. Judge, 81 A. 830; State ex rel. Notal vs. Recorder, 87 A. 827.

8. Where lower judge issues an injunction to prevent institution of suit on claims which are alleged to have been paid.

State ex rel. Sweeney vs. Judge, 40 A. 1; State ex rel. Sweeney vs. Rightor, 89 A. 619.

9. Where lower district judge is proceeding to execute a judgment of justice of the peace, particularly where validity thereof is contested.

State ex rel. Police Jury vs. Judge, 89 A. 964.

10. Where district court takes cognizance of an appeal from a judgment by a city court, when such appeal should go direct to Supreme Court.

State ex rel. Boutroue vs. Judge, 80 A. 415; State ex rel. City vs. Judge, 41 A. 540.

11. Where lower judge is incompetent because recused as having interest and proceeds to hear plea of recusation.

State ex rel. Tyrrell vs. Judge, 88 A. 1298; State ex rel. Segura vs. Judge, 87 A. 268; State ex rel. Trimble vs. Judge, 88 A. 247.

(H) Condition of affairs existing at time of application for writ determines:

1. Thus, where case is removed to circuit court, State court is divested of jurisdiction and prohibition lies to stay proceedings therein.

Davidson vs. Judge, 88 A. 178.

2. Yet where circuit court dismisses the case the jurisdiction of the State court is reinstated, and writ will be denied.

State ex rel. Davidson vs. Judge, 88 A. 178.

3. It has been also held that where court had no jurisdiction at institution of suit, subsequent investiture of jurisdiction will not cure nullity.

Mora vs. Kuzac, 21 A. 754.

847. Mode of Obtaining Writ—To obtain this mandate, the defendant who complains that the inferior court wishes to transcend its jurisdiction, shall apply by petition to the court having cognizance of appeals from such inferior court, stating the cause and nature of the action brought against him, and showing that the said court is not competent to try it.

848. Affidavit of Applicant Necessary—The court to which this petition is offered shall require the oath of the petitioner to the truth of the facts stated in it, unless these facts be proved by the mere examination of the prayer, or of the proceedings which took place before the inferior court.

Affidavit: when not necessary:

When facts appear from record of case.

Berthaud vs. Police Jury, 7 R. 550; State vs. Judge, 19 L. 174.

849. Issuance of Writ—If the court shall think that the matters stated in the petition are sufficient, it shall issue an order forbidding the judge to take cognizance of the cause, and forbidding the plaintiff to prosecute it further.

To whom writ issues:

1. To judge and to private individuals only when they are necessary factors in proceedings by the court:

State ex rel. Zimmerman vs. Judge, 34 A. 653; State ex rel. Dowling vs. Mix, 33 A. 794; State ex rel. Oientat vs. Judge, 32 A. 814; State ex rel. Levett vs. Lapeyrollerie, 38 A. 264; Clarke vs. Rosenda, 5 R. 7.

2. To clerk of court when illegally performing a judicial act, such as accepting a cession of property and staying proceedings against insolvent.

State ex rel. Boyd vs. Clerk, 34 A. 1029.

850. Duty of Lower Judge—When, on the receipt of this order, the inferior judge acknowledges that he has no jurisdiction, he shall abstain from all further acts in the case.

851. Answer of Lower Court—Summary Hearing—But if he believes himself competent, he may give a written answer to the order, after which the court issuing it shall pronounce finally and summarily on the right of jurisdiction; and if it thinks that the inferior judge is not competent to judge the cause, it shall render its prohibition perpetual, otherwise it shall allow the judge to proceed to the trial and judgment of the case.

(A) Summary trial:

1. Hearing of application for prohibition is summary, but ~~it~~ seems can not be had in vacation and at chambers; ~~aliter as~~ to mandamus, under Art. 830, C. P.

State ex rel. Southern Bank vs. Judge, 22 A. 682.

2. But writ will not be perpetuated until lower judge has had opportunity to file answer.

State vs. Judge, 9 R. 490.

(B) Decree executory only after lapse of usual delay for rehearing.

State ex rel. Gerson vs. Judge, 57 A. 261; Overruling State vs. Judge, 15 A. 118; State ex rel. Gauson vs. Judge, 21 A. 50.

(C) Answer to rule nisi for prohibition should be sworn to.

State ex rel. Kramer vs. Judge, 80 A. 1014.

852. Disobedience Punished as Contempt—If, in contempt of the order, the judge or the party shall proceed any farther in the suit, the superior tribunal shall cause them to be arrested, and shall punish them for such contempt, and the opposite party shall have an action for his damages against them.

853. Writ Intended to Stay Execution Goes to Party and to Officer—If an inferior judge has rendered judgment in a case where he had not jurisdiction, and the execution has issued, the court may direct its order as well to the party prosecuting, as to the officer charged with the execution, forbidding them to proceed in the execution, in the same manner as if the prohibition had been addressed to the judge before issuing the order of execution, and under the same penalties above enacted.

854. Party Prosecuting Execution May Move Denial of Writs—But in this case, the party prosecuting may reply to the order, in the same manner as above directed, for obtaining judgment with regard to the jurisdiction of the inferior judge.

§ 3.

Of the Mandate Having for Its Object to Ascertain the Validity of a Judicial Proceeding (Writ of Certiorari).

855. Certiorari—This also is an order rendered in the name of the State, by a competent tribunal, and directed to an inferior judge, commanding him to send to such tribunal a certified copy of the proceedings in a suit pending before him, to the end that their validity may be ascertained.

What courts may issue writ:

1. Supreme court, by virtue of Art. 90 of the Constitution of 1879, may issue writ even in cases where it has no appellate jurisdiction, if issuance proper in other respects.

State ex rel. New Orleans Gas Light Co. vs. Judges, 37 A. 235; State ex rel. Hirsch vs. Judge, 39 A. 97; State ex rel. City of New Orleans vs. Judge, 32 A. 549; State ex rel. Sheehan vs. Judge, 32 A. 315; State ex rel. Fredricks vs. Skinner, 33 A. 146; State ex rel. Ohlsm & Boyd vs. Judge, 34 A. 1178; State ex rel. Murray vs. Judge, 36 A. 531; State ex rel. McGee, Snowden & Violet vs. Judges, 33 A. 182.

2. Rule was otherwise under previous Constitution, under which court could not issue the writs where it has no appellate jurisdiction.

State ex rel. Padron vs. Judge, 31 A. 795; State vs. Judge 15 A. 123; State ex rel. Ohlsm vs. Judge, 34 A. 1178; Bush vs. Head, 22 A. 69; State ex rel. Cabalero vs. Judge, 26 A. 331; State ex rel. Henry vs. Judge, 8 A. 238; Succession of Whipple, 3 A. 237; *Ex parte* Bujoe, 1 A. 716; Succession of Macarty, 2 A. 977; Lavery vs. Duplessis, 3 M. G.; State vs. Watts, 8 L. 76; State vs. Judge, 11 R. 265; State vs. Judge, 1 A. 184; State ex rel. Taylor vs. Judge, 26 A. 121; State ex rel. D'Mena vs. Judge, 21 A. 123; State ex rel. Geale vs. Recorder, 30 A. 63; Shalor's Case, 9 A. 522.

856. Writ Suspends Proceedings—This mandate concludes by enjoining upon the inferior judge to proceed no further in the case, until judgment shall be pronounced on the regularity of his proceedings.

857. When Writ Will Issue—This mandate is only granted in cases where the suit is to be decided in the last

resort, and where there lies no appeal, by means of which proceedings absolutely void might be set aside, as when the inferior judge has refused to hear the party or his witnesses, or has pronounced sentence without having cited them to appear.

(A) Object, scope and issuance of Certiorari:

Writ will issue:

1. To coerce lower clerk to perfect transcript of appeal.

C. P. 899, Notes; *Borde vs. Erskine*, 33 A. 873; *State vs. Hobbs*, 33 A. 227; *Desmarais vs. Board*, 42 A. 799; *Lewis vs. Peterkin*, 39 A. 781; *Succession of Harvey*, 44 A. 80.

(a) Even after argument has been gone into.

Desmarais vs. Board of Police, 42 A. 799.

(b) Or after submission.

Trudeau vs. R. R. Co., 15 A. 717.

2. To test questions of forms—not of substance of proceedings. Merits of case not reviewable.

State ex rel. Valetton vs. Skinner, 33 A. 265; *State ex rel. Brown vs. Houston*, 35 A. 1194; *Wood & Bro. vs. Judge*, 38 A. 377, 921; *Troegel vs. Judge*, 35 A. 1164; *Waterworks Co. vs. Levy*, 36 A. 968; *State ex rel. Race vs. Judge*, 37 A. 120; *Bulsson vs. Judge*, 38 A. 1427; *Markey vs. Judge*, 38 A. 878; *State ex rel. Kramer vs. Judge*, 32 A. 217; *Brown vs. Ragland*, 35 A. 838; *State ex rel. Berthoud vs. Judge*, 34 A. 782; *State ex rel. Ins. Co. vs. Judges*, 36 A. 817; *State ex rel. City vs. Judge*, 32 A. 532; *State ex rel. Gooch vs. Judge*, 38 A. 968; *Matranga vs. Judge*, 42 A. 1069; *Unbehagen vs. Justice*, 34 A. 865; *State ex rel. Bloch vs. Perault*, 41 A. 179; *State ex rel. Shakespeare vs. Duffel*, 41 A. 557; *State ex rel. Chandler vs. Ellis*, 43 A. 825; *State ex rel. City vs. Judge*, 45 A. 952; *State ex rel. R. R. Co. vs. Riley*, 43 A. 177; *Broussard vs. Judge*, 39 A. 776.

(B) In what particular cases writ issues:

1. Where judge imprisons for contempt without authority and without hearing, as for perjury, or for alleged violation of injunction absolutely null.

State ex rel. Terrence vs. Judge, 37 A. 314; *State ex rel. DeBuys vs. Judge*, 32 A. 1236; *State ex rel. Liversey vs. Judge*, 34 A. 746.

2. Where judge refuses to hear witness:

As to value of thing in dispute to determine question of jurisdiction *ratione materis*.

State ex rel. Willsey vs. Judge, 33 A. 382.

3. And writ will issue, coupled with mandamus, when judge refuses to try a case and when refusal amounts to a denial of justice.

State ex rel. Boyd vs. Judge, 34 A. 1178; *State ex rel. Bright & Co. vs. Judge*, 36 A. 482.

4. Where judges of courts of appeal refuse to consider timely application for rehearing.

State ex rel. Tebault vs. Judges, 57 A. 597.

5. Where justice of peace in an unappealable case proceeds with trial and renders judgment without timely notice or within the two hours he is required by Art. 1085 to wait for absent party.

State ex rel. Montague vs. Coquillon, 35 A. 1102.

(C) When writ will not issue:

1. When remedy is by appeal.

State ex rel. Weber vs. Judge, 82 A. 1092; State vs. Judge, 15 A.M.; Stewart vs. Barrow, 6 N. S. 382; State ex rel. Aiken vs. Judge, 3 A. 360.

2. When proceedings are not absolutely null, as where all the forms of law have been observed.

May vs. Recorder, 39 A. 993; State ex rel. O'Malley vs. Judge, 35 A. 1294; State ex rel. Valetton vs. Judge, 33 A. 255; State ex rel. Broussard vs. Koenig, 39 A. 776; State ex rel. R. R. Co. vs. Justice, 43 A. 17; Westy vs. Judge, 32 A. 1122; Williamson vs. Judge, 37 A. 336; State ex rel. Syndie vs. Judge, 41 A. 560.

3. When nullity of proceeding does not appear on face of record.

State ex rel. Wintz vs. Judge, 52 A. 1222.

4. When object of writ is to coerce judge to admit evidence rejected on ground of inadmissibility.

State ex rel. Bright & Co. vs. Judges, 36 A. 482; State ex rel. Uabehagen vs. Justice, 35 A. 365.

5. When applicant for *certiorari* sanctioned proceedings, as where no timely objection was made of want of jurisdiction *ratione personæ*.

State ex rel. Zuberbier & Behan vs. Judge, 33 A. 16.

6. When it would be vain, as where clerk can not make up record.

Beard vs. Poydras, 18 L. 86.

7. When in contempt proceedings, judge had jurisdiction to make the order.

State ex rel. Waters & Kiernan vs. Judge, 41 A. 214; State ex rel. Barthelet vs. Judge, 40 A. 434.

858. Recitals of Petition—The party wishing to obtain this mandate shall address his petition to a competent tribunal, in which he shall state the causes of nullity of

the acts done by the lower court to his prejudice, in a cause where lies no appeal.

859. Affidavit of Petitioner—The truth of the facts contained in this petition shall be sworn to by the party praying for the mandate, but with respect to the nullities alleged, he need only affirm their existence to the best of his knowledge.

860. What Court Issues Writ—This mandate can only be directed to an inferior judge by the court having immediate appellate jurisdiction over him, and by no other.

1. Restriction as to appellate jurisdiction applies to all courts other than Supreme Court. See *ante*, Art. 855.

State ex rel. Gas Light Co. vs. Judge, 87 A. 286; *State ex rel. Hirsch vs. Judge*, 89 A. 97.

2. *To whom writ issues*: May issue to lower judge and clerk, as when it orders perfection of transcript.

O. P. 899; *Borde vs. Erskine*, 88 A. 878; *State vs. Hobbs*, 88 A. 227.

861. Certified Copy of Record Sent Up—The inferior judge, to whom this mandate is directed, shall immediately send to the superior court a certified copy of the record called for, which copy shall be sealed with the seal of the court, if it have one.

Sending up record:

1. Production of record dispensed with when facts are not disputed.

State ex rel. Bulsson vs. Judge, 88 A. 1427.

2. Judge's duty is to send up record.

Geale vs. Recorder, 80 A. 450; *DeBuys vs. Judge*, 82 A. 1256; *Duocote vs. Judge*, 42 A. 408.

3. Conclusiveness of record.

Record conclusive until assailed successfully.

State ex rel. Regan vs. Judge, 86 A. 977.

862. Penalty for Failing to Send Up Record, or for Proceeding with Cause—If after the service of the man-

date and the injunction contained in it, the inferior judge does not send the copy of the record called for, or if he proceeds further in the cause, the superior court shall order him to be arrested and imprisoned until he shall have obeyed the mandate directed to him.

863. Proceedings After Service of Writ Void—The mere service of the order to send up the record renders void every act which may have been subsequently performed by the judge to whom it was directed or by his order.

864. Writ Perpetuated When Proceedings Are Null and Were Not Sanctioned—If upon examining the certified record thus sent, it shall appear to the court issuing the mandate that the proceedings are null and have not been sanctioned by the party complaining of them, it shall avoid the proceedings and direct the inferior judge to try the cause anew, in conformity with the provisions of the law.

Sanctioning proceedings is waiver of ground of complaint—

e. g.:

When defendant does not object to want of jurisdiction *ratione personæ*.

State ex rel. Zuberbier & Behan vs. Judge, 33 A. 16.

865. When Proceedings Are Regular, etc.—If the court which issued the mandate finds that the proceedings have been regular, or that the party has waived his objections to them, it shall dissolve the order which it had issued, and shall condemn the party who applied for the mandate to pay the whole costs.

866. Writ Operates as Injunction to Stay Proceedings—When a court of competent jurisdiction issues a mandate for the purpose of inquiring into the validity of a

proceeding in the last resort, if judgment has been rendered and execution sued out in the court below, it may arrest the execution, by enjoining the party suing it and the officer charged with it to proceed no further until the validity of the proceedings has been pronounced upon, and this under the same penalties which are inflicted for contempt of court.

§ 4.

Of the Mandate to Prevent an Usurpation of Office (Writ of Quo Warranto).

867. Quo Warranto—This is an order rendered in the name of the State by a competent court, and directed to a person who claims or usurps an office in a corporation, inquiring by what authority he claims or holds such office.

Function of writ:

1. To test title to office in corporations.
State ex rel. Piper vs. Batt, 88 A. 966.
2. To test right, not only to office, but to franchise, as where it is alleged that a party without authority exercises rights, duties and privileges of an alderman.
Reynolds vs. Baldwin, 1 A. 162.

868. When Writ Issues—This mandate is only issued for the decision of disputes between parties in relation to the offices in corporations, as when a person usurps the character of Mayor of a city, and such like.

With regard to offices of a public nature, that is, which are conferred in the name of the State by the Governor, with or without the consent of the Senate, or by election, the usurpations of them are prevented and punished in the manner directed by special laws.

1. Title to what offices may be tried under writ:
Mayor, Recorder, or other city officer.
State ex rel. Baldwin vs. Ramos, 10 A. 421.

2. Title to office conferred or filled by Governor can not be enquired into under *quo warranto*.

Terry vs. Stauffer, 17 A. 311.

8. *When writ will not issue:*

When remedy is by mandamus, as where Mayor withholds commission.

Hubert vs. Auvray, 5 L. 535.

869. Who May Obtain Writ—Answer of Respondent—

A mandate to prevent the usurpation of an office in a city or other corporation may be obtained by any person applying for it, and the party to whom it is directed must make his answer in writing within the time allowed by the court, and state the authority under which he exercises his office.

Who may obtain writ:

Only parties pretending to the office in contest. Mere private citizens, though tax-payers, can not inquire into right to municipal offices.

State vs. Mason, 14 A. 506; Voisin et al. vs. Leche et als., 23 A. 25.

870. *When Respondent Fails to Answer*—If the person to whom the order is directed does not answer within the time allowed, the court shall declare him not qualified to fill the place of which he performs the duties, shall forbid him to perform them any longer, shall condemn him to pay the costs and shall direct the corporation to proceed to a new appointment.

New election—when:

Where relator is not entitled to office from which defendant is ousted, court shall order a new election.

State ex rel. Staes vs. Gastinel, 18 A. 517; Reynolds vs. Baldwin, 1 A. 162.

871. *Answer—Summary Trial*—But if the person to whom the order is directed answer within the time allowed, the court shall pronounce upon the answer in a

summary manner, and after hearing the parties; if it thinks that the person to whom the mandate was directed has usurped the office which he holds or that he continues in it unlawfully, it shall render judgment against him in the manner provided in the preceding article.

872. Clerk Issues Mandates Under Seal—Sheriff Serves
—All mandates treated of in the second section of this chapter, shall be issued by the clerk upon the order of the judge, in the name of the State and of the court which renders them, shall be sealed with the seal of such court, and signed by the clerk in his official character.

These mandates shall be delivered to the sheriff, who shall serve them on the person to whom they are directed.

873. When Quo Warranto Will Not Issue—When the Legislature has granted to a corporation the right to determine the validity of the elections of its members or officers, courts of justice shall not issue mandates for the purpose of inquiring into that fact.

TITLE II.

OF PROCEEDINGS IN THE SUPREME COURT OF THE STATE.

874. Jurisdiction of Supreme Court—The Supreme Court has only appellate jurisdiction, which it exercises in all cases, where the object in dispute exceeds the sum of five hundred dollars.

1. Original jurisdiction of Supreme Court.

See Constitution 1879, Arts. 89 and 200.

2. Jurisdiction of Supreme Court under prior Constitutions.

See Art. 74 of 1868, 70 of 1864, 62 of 1862, 68 of 1845, and 62 of 1812.

3. *Appellate jurisdiction under Constitution of 1879:*

Art. 81 provides: "The Supreme Court, except in cases hereinafter provided, shall have appellate jurisdiction only, which jurisdiction shall extend to all cases when the matter in dispute, or the fund to be distributed, whatever may be the amount therein claimed, shall exceed one thousand dollars, exclusive of interest; to suits for divorce and separation from bed and board, and to all cases in which the constitutionality or legality of any tax, poll or impost whatever, or of any fine, forfeiture or penalty imposed by a municipal corporation shall be in contestation, whatever may be the amount thereof; and in such cases, the appeal on the law and the fact shall be directly from the court in which the case originated to the Supreme Court; and to criminal cases on questions of law alone, whenever the punishment of death or imprisonment at hard labor may be inflicted, or a fine exceeding three hundred dollars (\$300) is actually imposed."

4. *Amendments of Article 81:*

Art. 125 of 1882, ratified in 1884, raises lower limit of jurisdiction to two thousand dollars, and extends jurisdiction irrespective of amount to suits for interdiction and nullity of marriage, and to suits involving homestead rights.

5. *Effect upon pending suits of amendment raising jurisdictional amount:*

- (a) Effect of amendment was to deprive Supreme Court of jurisdiction over pending suits where amount was over one thousand and less than two thousand dollars. Record must be sent to court of appeals.

Meyer vs. Stubbs, 52 A. 795; Walmsley & Co. vs. Nicholls, 36 A. 79; 52 A. 276.

- (b) But when right to go to court of appeals is doubtful, Supreme Court will merely dismiss appeal.

Groebe! vs. Bistroph, 35 A. 490.

- (c) Where no court after the amendment has jurisdiction of a pending cause, dismissal ensues.

Ins. Co. vs. Ritchie, 5 Wall. 541; *Ex parte McCardle*, 7 Wall. 305; Cushing vs. Hickie, 20 A. 567; Meyers vs. Mitchell, 20 A. 385; Zuberbier & Behan vs. Morse, 36 A. 972; Walmsley & Co. vs. Nicholls, 36 A. 801.

875. Appellate Jurisdiction—The Supreme Court has jurisdiction, though the judgment appealed from be for less than five hundred dollars, if the demand was for more than that sum. Its jurisdiction extends to all cases in which the constitutionality or legality of any tax, toll or impost of any kind or nature whatsoever, or any fine, forfeiture or penalty imposed by a municipal corporation shall be in contestation, whatever may be the amount thereof; and in such cases the appeal shall be direct from the court in which the case originated, to the Supreme Court; and in criminal cases on questions of law only, whenever the punishment of death, or imprisonment at hard labor, or a fine exceeding three hundred dollars is actually imposed.

See Art. 81 of Constitution 1879.

ANALYSIS OF ARTICLE 81 OF CONSTITUTION 1879, FIXING APPELLATE JURISDICTION OF SUPREME COURT.

CIVIL APPELLATE JURISDICTION.

(A) Appellate jurisdiction only is granted except where otherwise provided. Hence Supreme Court can not—

1. Entertain suit to annul its own judgment.

Succession of Martin vs. Succession of Hoggatt, 37 A. 340; Walker vs. Barelli, 32 A. 1159; Skillern vs. May, 6 Cranch, 267; *Ex parte* Story, 12 Peters, 339; Washington Bridge Co. vs. Stewart, 3 How. 418; but see 15 Peters, 119, and United States vs. Gomez, 23 How. 326.

But this rule applies only where judgment was rendered in pursuance of appellate jurisdiction. In matters of original jurisdiction, Supreme Court may entertain action of nullity, rescission, motion for new trial, etc.

See Lazarus vs. McQuirk, 42 A. 194.

2. Dictate to lower judge what particular judgment to render.
State ex rel. Luminals vs. Judges, 34 A. 1115.

3. Consider motion and affidavit to supply deficiency of matter of record as to show—

That judge *ad hoc* was not sworn.

Nugent vs. Stark, 34 A. 630.

4. Consider plea of estoppel by acquiescence—when facts are *in pais*.
Tanneret vs. Ins. Co., 52 A. 663; Nunez vs. Winston, 21 A. 667; but see Evans & Taylor vs. Succession of Etheridge, 29 A. 576.
 5. Consider whether curator *ad hoc* entitled to additional fee—no application being made in lower court.
Chaffe vs. Ludeling, 84 A. 968.
 6. Render a judgment based on consent given in Supreme Court.
Succession of Carroll, 53 A. 141.
 7. Decide that attorney consenting to dismissal of appeal had no authority to do so.
Waits vs. Railroad Co., 85 A. 628; Boreland vs. Leekie, 27 A. 235.
 8. Determine that liquidator made a party was not properly appointed.
Ins. Co. vs. Pike, 83 A. 823.
 9. That there is amount in dispute sufficient to give jurisdiction.
State ex rel. Schwab vs. Judge, 22 A. 51; State ex rel. Cain vs. Judge, 20 A. 575; Keenan vs. Freret, 22 A. 81; but see affidavit of appealable amount post.
 10. That appellant does not approve of appeal.
Benhan vs. Parish of Carroll, 28 A. 343.
 11. Consider issue not passed on in lower court.
Mellon vs. Gilmore, 83 A. 1406; Rougelot vs. Quick, 84 A. 127.
 - (a) As disputed acquiescence in form of proceeding.
State ex rel. Fairex vs. Judge, 33 A. 929.
 - (b) Or in judgment appealed from.
Evans & Taylor vs. Etheridge, 29 A. 576; James vs. Fellowes & Co., 28 A. 87; Nunez vs. Winston, 21 A. 666; State ex rel. Martin vs. Police Jury, 28 A. 272.
- (B) *Exclusion of original jurisdiction does not deprive court of powers necessary to exercise its appellate jurisdiction—e. g.:*
1. Making new parties in case of—
 - (a) Death.
Howard vs. Yale, 27 A. 621; Olinde vs. Gougis, 4 M. 28.
 - (b) Insolvency or bankruptcy.
Wardt vs. Brandt, 9 M. 680.
- Assignee of bankrupt can not be forced to be a party. He has discretion.
Serra e Hijo vs. Hoffman, 29 A. 17; Hill & Co. vs. Bourgeois, 29 A. 841.

(c) Vacation of office by litigant officers. Successors made party.

State ex rel. Canal Co. vs. City et al., 85 A. 70; La. Mutual Ina. Co. vs. Costa, 82 A. 8.

.2 Entertaining rule brought by appellee against clerk of Supreme Court to deliver certificate that record not filed in time by appellant so that execution may issue.

O. P. 589; Lecroix vs. Bonin, 88 A. 119.

8. Ordering clerk to remedy defective transcript.

O. P. 899; Troustine vs. Ware & Munn, 88 A. 780; Edson vs. McGraw, 87 A. 294.

(C) *Consent can not vest jurisdiction.*

Wilkins vs. Gantt, 82 A. 980; Field's vs. Gagne, 88 A. 889; Heirs of Gee vs. Thompson, 89 A. 810; Duncan vs. Holt & Co., 21 A. 235; Tague vs. Insurance Co., 88 A. 456.

(D) *Want of jurisdiction noticed ex proprio motu:*

City vs. Apken, 86 A. 419; Boutte vs. Maillard, 19 A. 276; 26 A. 87; Rogers vs. Goldthwalte, 82 A. 48; State vs. Dopf, 22 A. 400; 28 A. 668; Schmidt & Ziegler vs. Brown & Straus, 88 A. 417; Gross vs. Herman, 85 A. 496; Rhodes vs. Black et al., 84 A. 407; 21 A. 754; City vs. Sealgo, 41 A. 1141; State ex rel. Newman vs. Hayles, 82 A. 1185.

Appeal dismissed ex proprio motu.

1. When there is no money value in dispute and case is not an excepted one. *Id.*

Bloch, Brittin & Co. vs. Barton, Miller & Co., 27 A. 89; Saux vs. Patton et al., 84 A. 1155.

2. When amount in dispute does not exceed lower limit of jurisdiction.

Pinckney vs. Wolf, 41 A. 806; Boutte vs. Maillard, 19 A. 276; State vs. Nick, 22 A. 400.

3. When appellant has no appealable interest.

27 A. 90; 19 A. 828; 28 A. 80.

4. When judgment below is not signed.

28 A. 262; 20 A. 583.

5. Dismissal *ex proprio motu* may be ordered on discovery of want of jurisdiction even after examination of merits.

Halpin & Moran vs. Maxwell, 24 A. 94.

6. When appeal does not come within letter of Constitution.

Insurance Co. vs. Gernon, 88 A. 849.

(E) *Subject matter of suit. Pecuniary value:*

Except in certain cases, matter in dispute must have *pecuniary value*; hence court has no jurisdiction:

1. In suit for office to which no pecuniary perquisite attached.

State ex rel. Simmons vs. DeVargas, 28 A. 842; State ex rel. Belden vs. Markey et al., 21 A. 748; State ex rel. Newman vs. Hayles, 33 A. 118; Bloch, Brittin & Co. vs. Barton, Miller & Co., 27 A. 89; State ex rel. Schwab vs. Judge, 22 A. 49; Schwartz vs. Firemen's Charitable Association, 41 A. 405; but see State vs. City, 41 A. 156, where Police Board, the members whereof receive no pay, mandamus Mayor to recognize them and carried the case to Supreme Court and appeal was maintained.

2. In proceeding by mandamus to secure possession of books, keys, etc.

(a) In sheriff's office, when interest of applicant not shown to amount to \$500 (\$2000).

State ex rel. Creagh vs. Judge, 21 A. 109; State ex rel. Sternberg vs. Lagarde, 21 A. 18; 12 A. 719; Lafitte vs. Duncan, 4 N. S. 68; State ex rel. Wrotnowski vs. Bryan, 21 A. 186.

(b) Or clerk's office.

Police Jury vs. Hubbs, 38 A. 149; Police Jury vs. Miscar, 34 A. 684.

(c) Or to have access to corporate books.

State ex rel. Newgass vs. Friedlander, 25 A. 48; Pike vs. Judge, 27 A. 677.

3. In suit brought under intrusion into office act to determine rights of parties to seats as aldermen, and city, a third party, appeals.

State ex rel. Belden vs. Kaiser et al., 21 A. 743.

4. Where plaintiff merely asks for injunction and reserve of right to sue for damages.

Saux vs. Patton et al., 34 A. 1155.

5. Where suit is brought for mandamus by police jury to compel clerk and sheriff to remove office and archives to new seat of justice.

State ex rel. Police Jury vs. Miscar, 34 A. 835.

Aliter where citizen intervenes and shows appealable interest.

Moore vs. Police Jury, Id., p. 836.

6. Where notary appeals from judgment ordering him to deliver records of deceased notary to officer designated by law to receive them.

State ex rel. Hero vs. Laresche, 24 A. 148. But see State ex rel. Garland vs. Theard, 45 A.

7. Where corporation appeals from order to permit party to examine its books.

State ex rel. De St. Romes vs. Cotton Press Co., 22 A. 622.

8. Where suit is under intrusion act for office of councilman.
State ex rel. Simmons vs. De Vargas et al., 28 A. 342.

(a) Or for office of member of Board of Administrators of State University or of Agricultural and Mechanical College, to which no pay is attached.

State ex rel. Buckner vs. Jastremski et al., 33 A. 110.

(b) *Aliter* where office carries salary or fees.

State ex rel. Egan vs. Follett, 33 A. 231.

9. When appeal is taken from order dissolving injunction by which superintendent of Canal and New Basin was prohibited from removing lumber from banks.

Buddig vs. Baldwin, 38 A. 386; but see McCarley vs. Lemonnier, 40 A. 235, where appeal maintained in a suit to establish road as public.

(F) *Exceptions to the rule requiring interest of appellant to be pecuniary:*

1. Divorce cases, and suits for separation from bed and board, also for nullity of marriage.

Act 125 of 1882; Bryant vs. Austin, 36 A. 306; Butler vs. Washington, 45 A. 284.

2. Suits for interdiction and nullity of marriage.

Act 125 of 1882.

3. Suits involving homesteads.

Act 125 of 1882.

This refers only to homestead as mentioned in Constitution, not to misnamed homestead referred to in C. C. 3552.

State ex rel. Davidson vs. Judges, 37 A. 109; Kinder vs. Lyons, 38 A. 714.

4. All cases in which the constitutionality or legality of any tax, toll or impost whatever, or of any fine, forfeiture or penalty imposed by a municipal corporation shall be in contestation:

(a) Constitutionality or legality of a tax being at issue, appeal lies irrespective of amount.

Cole vs. Randolph, 31 A. 535; Pratt vs. Holmes, 43 A. 1016; State ex rel. Brazeale vs. Frank, 42 A. 225.

(b) Constitutionality of tax at issue when law under which imposed is unconstitutional, or where property assessed and sought to be taxed is exempt by Constitution.

Adler, Goldman & Co. vs. Board of Assessors, 37 A. 507; State ex rel. City vs. Judge, 41 A. 540.

(c) **Legality of tax at issue when there is no law authorizing it.**

Adler, Goldman & Co. vs. Assessors, 57 A. 503; Forman vs. Assessors, 85 A. 825.

(d) **Or a law which is invalid.**

McGuire vs. Vogh, 86 A. 812; State vs. Blaser, 86 A. 861; State ex rel. David vs. Judges, 87 A. 898.

(e) **Or where there is a valid law which tax violates.**

Id.; Gillis vs. Clayton, 88 A. 285; State vs. Sies, 89 A. 918.

(f) **Illegality of assessment, as where mere debt is assessed at domicile of debtor, not that of creditor.**

V. & A. Meyer & Co. vs. Sheriff, 41 A. 646.

(g) **No law to authorize a license tax claimed.**

Parish of Morehouse vs. Brigham, 41 A. 686.

5. But constitutionality or legality of tax is not at issue:

(a) **When complaint is merely of irregularity or want of form of assessment.**

Adler, Goldman & Co. vs. Board of Assessors, 87 A. 888; State ex rel. David vs. Judges, 87 A. 898; Bush & Levert vs. Police Jury, 89 A. 899; Minor vs. Budd, 88 A. 99; Favrot vs. City, 88 A. 286; State ex rel. Badger vs. Recorder, 41 A. 534.

Or excessive assessment.

Gillis & Kennett vs. Assessor, 83 A. 286; Block vs. Fontenot, 85 A. 965.

(b) **Or when complaint is merely as to mode of enforcing payment of taxes, as when warrant refused in payment.**

Cobb vs. McGuire, 86 A. 801; Stubbs vs. McGuire, 83 A. 818; Forman vs. Hayles, 83 A. 1185; Ocrean vs. Bouny, 83 A. 1191.

(c) **Or where sole question raised is as to constitutionality or legality of the interest imposed by the Legislature upon delinquent municipal taxes.**

State ex rel. Rivet vs. Judge, 86 A. 266.

(d) **Or where sole contention is that relator's property is not liable to drainage tax because it is not due, or because it has already been paid, or because consideration therefor, to-wit: drainage work, has been abandoned.**

State ex rel. Johnson vs. City of New Orleans, 89 A. 843.

(e) **Or where sole question presented is one of procedure only.**

City vs. Schoenhause, 89 A. 287.

(G) What is a "tax" within meaning of the Constitution:

It is a "burden, charge or imposition for public use."

Ins. Co. vs. Soule, 7 Wall. 483; Worsley et al. vs. Second Municipality, 9 R. 825; Delcambre vs. Clere, 84 A. 1051.

2. There is no "tax" where charge is:

(a) Wharfage.

Sweeney vs. Otis, 87 A. 520; *Transportation Co. vs. Parkersburg*, 107 U. S. 686; *Sweeney vs. Sailer & Son*, 87 A. 585.

(b) Claim against riparian proprietor for costs of repairs made on public road and levee on his property.

Police Jury vs. Mitchell, 87 A. 44.

(c) Local assessment for construction of levees, public roads and for opening of streets and for like purposes.

Lafayette vs. Asylum, 4 A. 1; *Yeatman vs. Crandall*, 11 A. 226; *In re Application of City for Opening of Streets*, 20 A. 499; *Rooney vs. Brown*, 21 A. 51; *Board of Levee Commissioners vs. Lorio Bros.*, 33 A. 276; *Barrow vs. Hepler*, 34 A. 363; *Excoelsior Planting and Manufacturing Co. vs. Green*, 39 A. 480; *Crowley vs. Copely*, 2 A. 529; *Wesley vs. Municipality*, 9 R. 830; *Draining Co. Case*, 11 A. 570; *Ellerman vs. R. R. Co.*, 34 A. 705; *Charnock vs. Levee Co.*, 33 A. 528.

(d) Quarantine fee.

Railroad and Steamship Co. vs. Board of Health, 36 A. 639.

(H) Toll or impost:

1. Appeal lies where constitutionality or legality of toll is contested.

Carondelet Canal Co. vs. Tedesco, 87 A. 100.

Or of impost.

State vs. Pittsburg Coal Co., 41 A. 465.

(I) Appeal lies where constitutionality or legality of fine, forfeiture or penalty imposed by a municipal corporation is contested.

State vs. Isabel, 40 A. 841; *State vs. Gisch*, 31 A. 544; 42 A. 841.

1. No such case arises:

(a) Where sole question is raised of constitutionality of city ordinance unaccompanied by disputed legality or constitutionality of any fine, forfeiture or penalty imposed by a municipal corporation.

(b) Where sole question is of legality of fine imposed by municipal corporation, not of constitutionality of ordinance.

Ex parte Travers, 3 A. 696; *Third Municipality vs. Blanc*, 1 A. 305.

(c) Where no fine, forfeiture or penalty is imposed, but only certain interest on delinquent municipal taxes.

State ex rel. Rivet vs. Judge, 36 A. 285.

- (d) Where such fine, penalty or forfeiture is not imposed by a municipal corporation, but by a State law.

State ex rel. Elvet vs. Judge, 36 A. 296; Geale vs. Recorder, 30 A. 450; Augusti vs. Houston, 30 A. 1174; Barry vs. Garnier, 31 A. 831; Orleans vs. Blanc, 1 A. 335; Donaldsonville vs. Richard, 4 A. 83; Municipality vs. Corning, 4 A. 407; Albert vs. Brewer, 9 A. 64.

- (e) Where issue of constitutionality was not raised in lower court.

City of New Orleans vs. Hill, 32 A. 1162; State vs. Tsi Ho et al., 37 A. 50; State ex rel. Lamarque vs. Recordér, 39 A. 341; Block vs. Fontenot, 35 A. 965; 10 A. 724; State vs. Widow de St. Romes, 26 A. 758; State vs. Hennessy, 44 A. 805.

- (f) But it is not necessary that pleadings below should show what particular law or constitutional provision was violated.

State ex rel. Boos vs. Currie, 35 A. 887; Bridge Proprietors vs. Hoboken Co., 1 Wall. 116.

- (g) Nor that pleadings in recorder's court should be written and should show an allegation of unconstitutionality.

State ex rel. Stinson vs. Murphy, 41 A. 526.

- (h) Nor will constitutionality of city ordinance be passed upon unless complainant was condemned to some penalty or opposing party was wrongfully released therefrom.

Bateman vs. Mayor and Council of Morgan City, 32 A. 892; Levy vs. City of Shreveport, 27 A. 620.

- (i) Nor where ordinance is not in the record, and the answer does not specifically attack its constitutionality or legality.

City vs. Hill, 32 A. 1161; State vs. Ciesl, 44 A. 87; City vs. Labatt, 33 A. 107.

- (J) *Mixed questions of constitutionality or legality of tax, toll, impost, etc.:*

Where appeal presents question of legality of tax, and also of irregularity in mode of levying and collecting, appeal is entertained on question of illegality of tax and ignored otherwise.

State vs. Justice, 12 A. 799; Baton Rouge vs. Malverhill, 15 A. 215; Board of Health vs. Pooley, 11 A. 743; Police Jury vs. Villavabia, 12 A. 788; Favrot vs. City of Baton Rouge, 38 A. 230; State vs. Rebasea 9 A. 305; Albert vs. Brewer, 9 A. 64.

And questions of fact as well as of law are considered on such appeal.

State vs. Coal Co., 41 A. 467; Minden vs. Silverstein, 36 A. 912.

(K) Appeal direct to Supreme Court in cases enumerated:

1. Appeal direct from court where suit originated.

City vs. Arthurs, 36 A. 98; State ex rel. Bertel vs. Board, 34 A. 574; Minden vs. Silverstein, 36 A. 56, 912; State vs. Rebassa, 9 A. 305; Willmot vs. City, 27 A. 158; Boutroue vs. Judge, 30 A. 415; Devron vs. Municipality, 4 A. 11; City vs. Judge, 41 A. 541.

2. And jurisdiction of Supreme Court to hear such appeal protected by prohibition to lower court.

State ex rel. City vs. Judge, 41 A. 541.

3. In cases not enumerated as being directly appealable to Supreme Court, the appeal is governed entirely by amount involved.

Babin vs. Delahoussaye, 31 A. 727.

(L) Fund to be distributed:

1. Appellate jurisdiction exists in all cases where the fund to be distributed, whatever the amount claimed, exceeds \$2000.

(a) Settlement in concurso of creditors.

Smith & McKenna vs. Charles, 27 A. 503; Haugherty vs. Thieberge, 24 A. 442; O'Hern vs. Gouldy, 26 A. 372; Lapene & Ferre vs. Meegel, 26 A. 80; 40 A. 150.

This rule does not prevail in Supreme Court of United States.

Seaver vs. Bigelow, 5 Wall. 209; Shields vs. Thomas, 17 How. 8.

2. Settlement of successions: where assets exceed \$2000—

e. g.:

(a) Contest over right of administration.

Succession of Bedford, 38 A. 244.

(b) Sale of succession property.

State ex rel. Upton vs. Judge, 37 A. 330.

(c) Distribution of assets by tableau.

Succession of Cousley, 39 A. 570; Succession of Gohs, 37 A. 423; Renshaw vs. Stafford, 34 A. 1133; but see Succession of Estopinal, 21 A. 264; Succession of Gale, 21 A. 487; Succession of Andrus, 34 A. 1063; Succession of LeSassier, 34 A. 1066; Succession of Cloney, 29 A. 327; Hickman vs. Judge, 28 A. 935.

(d) Partition of succession property.

Gray vs. Gray, 36 A. 868.

(c) Accounts of tutorship.

Tutorship of Minor Heir of Jones, 41 A. 620.

3. No jurisdiction where succession assets are less than \$2000.
 Succession of Thomas, 25 A. 19; Succession of McDowell, 25 A. 123.

(a) Or when assets having been distributed, sole claim in dispute is an item of \$227 for costs.

Succession of Dougart, 42 A. 517.

(b) Or when succession is closed.

Succession of Pointer, 20 A. 270.

4. Rule that fund to be distributed controls to determine jurisdiction, did not exist in any previous Constitution; but it was recognized in jurisprudence.

Succession of Durau, 24 A. 536; Renshaw vs. Stafford, 24 A. 1149; Succession of Cloney, 29 A. 277; Colt vs. O'Callaghan, 2 A. 120.

(M) Appeal lies in all cases where the amount in dispute exceeds two thousand dollars exclusive of interest.

1. Exclusion of interest. Amount in dispute or fund to be distributed must exceed two thousand dollars exclusive of interest.

2. No jurisdiction where amount exceeds two thousand dollars only by adding interest.

State ex rel. Forman vs. Recorder, 23 A. 14; Boani vs. Gordon et al., 24 A. 1052; Breaux vs. Recorder, 26 A. 742; 20 A. 1263.

3. Rule of exclusion of interest does not apply when such interest is an integral element of principal demand, as where suit is to compel parish officers to assess taxes to pay judgment with interest and costs.

State ex rel. Fisk vs. Police Jury, 24 A. 26.

4. Under Constitution of 1868 interest could be cumulated with capital to determine appellate jurisdiction.

Wilkins vs. Gantt, 22 A. 929.

5. But not interest accruing after judicial demand.

Fujol vs. Correjoles, 5 R. 90; Mason vs. Oglesby, 2 A. 732; Rogers vs. Goldthwaite, 22 A. 50; Mann & Co. vs. Norton, 21 A. 155; Schlemmer vs. Talliferro, 20 A. 525; Wolf vs. Wetherill & Co., 22 A. 25; Owen vs. Boyd, 7 A. 109; Jaquet vs. Webb, Levert & Co., 22 A. 111.

6. Attorney's fees are included.

Mayer vs. Stahr, 25 A. 57; 26 A. 61; 14 A. 25; Standifer & Co. vs. Covington, 25 A. 296.

(N) Amount in dispute must exceed two thousand dollars.

No jurisdiction where smaller sum is in dispute.

Schmidt & Ziegler vs. Brown & Straus, 23 A. 416; State ex rel. Newman vs. Hayles, 23 A. 1125; Succession of Thomas, 25 A. 19; 41 A. 123.

(O) Appealable amount.

1. It must clearly appear from record.

Schumert vs. Tamboury, 21 A. 198; Adams vs. Stark, 33 A. 304; Colomb & Gondolfo vs. McQuaid, 36 A. 527; City of New Orleans vs. Apken, 38 A. 419; State ex rel. Recorder of Mortgages vs. Clinton, 23 A. 235; Buddig vs. Baldwin, 38 A. 396; Wilkins vs. Gantt, 32 A. 929; Thompson vs. Lemelle, 32 A. 932; Hite vs. Hinsell & Tallien, 39 A. 113; Wade vs. Loudon, 30 A. 660; Succession of Broom, 14 A. 67; Dugan vs. Police Jury, 26 A. 673.

2. *Aliter* when amount is judicially noticed, such as amount of salary of district judge.

Fish vs. Collins, 21 A. 289.

3. It must appear from original, not supplemental petition, when sole object of latter appears to be to inflate claim.

March vs. McNelly, 36 A. 287; Buddig vs. Baldwin, 38 A. 396.

(P) Affidavit establishing appealable amount:

1. Affidavit to show appealable amount will be considered:

(a) When case involves pecuniary interest, but exact amount in dispute does not appear.

State ex rel. Police Jury vs. Miscal, 34 A. 334; State ex rel. Daboval vs. Police Jury, 39 A. 761; State ex rel. Hero vs. Pitot, 21 A. 386; Mayor and Council vs. Board of Police, 21 A. 447; Bathbone vs. Parish of St. James, 23 A. 324; Burke vs. Wall, 29 A. 33; Crescent City Live Stock and Slaughterhouse Co. vs. Larrieux, 30 A. 799; Buddig vs. Baldwin, 38 A. 394; State vs. Pitot, 21 A. 336; State ex rel. Cain vs. Judge, 20 A. 574; Hubert vs. Aubray, 6 L. 598; Knight vs. Smith, 3 M. 153; State vs. Wiltz, 11 A. 440; State vs. Judge, 20 A. 574; 30 A. 1136; but *contra* see 16 Peters, 231.

(b) When petition claims \$200 damages, but affidavit filed alleging greater amount.

Crescent City Slaughterhouse Co. vs. Larrieux, 30 A. 799.

2. Affidavit of pecuniary amount in dispute will not be considered:

(a) When suit by its nature and essence presents no issue of pecuniary gain or loss to the parties.

State ex rel. Police Jury vs. Miscal, 34 A. 336.

(b) When pleadings, nature of action, documents annexed show affidavit of appealable amount to be unfounded.

Buddig vs. Baldwin, 38 A. 394; 21 How. 391; Hite vs. Hinsell, 39 A. 113.

(c) When object of affidavit is to show right to suspensive appeal when application for mandamus is made.

State ex rel. Schwab vs. Judge, 22 A. 43.

(d) When it contradicts pleadings.

Bennett vs. Butterworth, 8 How. 124; Trustees vs. Dupuy, 31 A. 305.

3. When affidavit may be made:

It may be made after motion to dismiss.

State ex rel. Cain vs. Judge, 20 A. 574; State vs. Wiltz, 11 A. 440; Knight vs. Smith, 8 M. 158.

But it seems not after dismissal.

Richmond vs. Milwaukee, 21 How. 391; Bush vs. Parker, 5 Cranch, 257; *Ex parte* Bradstreet, 7 Peters, 634; The Grace Girdler, 6 Wall. 441.

4. Who makes affidavit:

Party or his counsel may make it.

State ex rel. Police Jury vs. Miscoar, 34 A. 335.

5. In what court affidavit may be filed:

It may be filed either in Supreme Court or in lower court.

State vs. Hackett, 5 A. 92; State ex rel. Cain vs. Judge, 20 A. 575; but see *contra* Meche vs. Lalamie, 30 A. 1133.

6. What affidavit must contain:**(a) Sufficient data to show sound foundation.**

Buddig vs. Baldwin, 33 A. 397.

(b) No contradiction of pleadings.

Id.; Richmond vs. Milwaukee, 21 How. 391.

(Q) Amount in dispute must exceed two thousand dollars:**1. No jurisdiction in Supreme Court where amount is exactly two thousand dollars.**

Hogan vs. Harrison, 22 A. 218; Oglesby vs. Helm, 26 A. 61; Maham vs. Benton, 26 A. 379; 14 A. 114; Teal vs. Pirtle, 34 A. 392; Knapp vs. Banks, 2 How. 73; 4 Wall. 163.

2. Such cases fall within jurisdiction of courts of appeal.

State ex rel. Harper vs. Judge, 33 A. 358; Ice Co. vs. Bank, 32 A. 397; State ex rel. Abraham vs. Judges, 45 A. 368.

(R) Amount disputed must exceed two thousand dollars; therefore Supreme Court has no jurisdiction—**1. Where admission of indebtedness reduces sum to less than two thousand dollars.****(a) Real amount in dispute is difference between sum claimed and sum admitted to be owing.**

Denegre vs. Moran, 35 A. 346; Teal vs. Pirtle, 34 A. 392; Stubbs vs. Maguire, 33 A. 1039; Girardey vs. City, 26 A. 291; Second Municipality vs. Corning, 4 A. 407.

- (b) But see *Abney, Love & Co. vs. Whited*, 28 A. 818, that mere admission of defendant will not destroy appealability of plaintiff's claim where plaintiff takes no judgment for amount admitted.

Blache vs. Aleix, 15 A. 50.

- (c) Where allegation is made of payment of all indebtedness that was due and rest denied, case differentiated from—

See *Miller vs. Gidlere & Marmande*, 86 A. 202. *Denegre vs. Moran*, 85 A. 846.

2. Where judgment having been previously rendered homologating account so far as not opposed, and appeal is taken solely from judgment dismissing opposition of \$237.60 to tableau.

Succession of Duran, 84 A. 565.

3. Where the plaintiff by a *remittitur* reduces amount to sum less than two thousand dollars.

State ex rel. Railroad Co. vs. Judge, 84 A. 865.

4. Particularly where plaintiff takes a judgment for part of debt admitted.

Blache vs. Aleix, 15 A. 50; *Municipality vs. Corning*, 4 A. 407; *Girardey & Co. vs. City*, 26 A. 291; 5 R. 447; *Abney, Love & Co. vs. Whited*, 28 A. 818.

5. *Remittitur*:

- (a) It must be entered before judgment.

C. P. 491; *State ex rel. Railroad Co. vs. Judge*, 84 A. 865; *Wolf vs. Minozenheimer*, 14 A. 114; *Western Union Telegraph Co. vs. Judge*, 21 A. 729; 14 A. 648; *LeBlanc vs. Pitman & Barrow*, 16 A. 481; 2 A. 186; 7 N. S. 861; 2 L. 102; 2 L. 286; 2 How. 78; *Blache vs. Aleix*, 15 A. 50.

- (b) And before verdict.

Gayden vs. R. R. Co., 59 A. 269; 34 A. 864; 34 A. 1117; *State ex rel. Railroad Co. vs. Judge*, 84 A. 1117.

- (c) *Remittitur* by plaintiff will not affect reconventional demand.

Vincent vs. Schweitzer, 17 A. 199; *Gore vs. Kneitig*, 8 R. 287; *Hanna vs. Bartlette*, 10 R. 488; *Ex parte Goodwin*, 11 R. 12.

(S) Amount in dispute exceeding two thousand dollars must be in dispute between the particular parties to the appeal:

1. Thus in mandamus suit by Police Jury to sheriff and clerk to compel removal to new parish seat, affidavit of pecuniary interest in the people of the parish will not prevent dismissal.

State ex rel. Police Jury vs. Misoar, 84 A. 834.

2. Nor will appeal lie where sole dispute is attorney's fee, with privilege on judgment, when fee is less than two thousand dollars, though judgment more.

Young vs. Duncan, 89 A. 86.

3. Nor will appeal lie in contest between plaintiff and garnishee when claim against him is less than two thousand dollars, no matter what amount is claimed from defendant.

Bank vs. Allen, 89 A. 806; Wood, Slayback & Co. vs. Bocchi, 82 A. 118.

4. But where two defendants were jointly sued for a claim exceeding two thousand dollars and judgment rendered as prayed for, and only one appeals, Supreme Court has jurisdiction though appellant's liability less than two thousand dollars. Whole judgment is necessarily attacked and disputed.

Dalcour vs. McCan, 87 A. 7; Lartigue vs. White, 25 A. 291; Same vs. Same, 26 A. 826; State ex rel. School Board vs. Cousin, 31 A. 237; State ex rel. St. Cyr vs. Jumel, 84 A. 201.

5. Rule is otherwise when defendants are not jointly or severally liable.

Larrieux vs. Crescent City Live Stock Landing and Slaughterhouse Co., 80 A. 609; La. Western R. R. Co. vs. Hopkins et al., 83 A. 881; Tague vs. Ins. Co., 88 A. 456; Marshall vs. Holmes, 39 A. 313; Cross vs. Bounney, 82 A. 1187.

(T) Tests of jurisdiction in dispute in particular actions:

1. *Rule to erase mortgages.* Test is amount of mortgage.

State ex rel. Bloss vs. Judges, 33 A. 1351; Buissiere vs. Williams, 31 A. 387; Endow vs. Ludeling, 84 A. 1024.

And in suits to erase inscription of drainage tax mortgage, test is amount of tax.

State ex rel. Johnson vs. City, 39 A. 342.

2. *Suit to annul tax sale by judicial mortgage creditor.* Test is amount of mortgage.

Fendler vs. Bates et al., 34 A. 595.

3. *Revocatory action.* Test is creditor's claim, not value of property.

Loeb & Bloom vs. Arent, 83 A. 1086; Schwartz vs. Schmidt, 71 A. C. Buffington vs. Blouin, 86 A. 826; Zuberbier & Behan vs. Morse, 81 A. 970; Livingstone vs. Hardie Bros., 41 A. 811; Pochelu vs. Catoinet, 40 A. 827; State ex rel. Zuberbier & Behan vs. Judge, 34 A. 1215; East & Barnett vs. Gill, 43 A. 1041; Flower vs. Prejeau, 42 A. 398; Fendler vs. Bates, 34 A. 595; Moore, McKinney & Co. vs. Ringuet, 45 A. 1118.

4. *Action en declaration de simulation.* Test is value of property. Whole title to property involved.

Godshaw & Plant vs. Judges, 38 A. 643; John Chaffe & Sons vs. De Moss and Wife, 37 A. 186; State ex rel. Bloss vs. Judges, 33 A. 1851; Moore, McKinney & Co. vs. Ringuet, 45 A. 1118.

5. *Mandamus proceeding to cancel tax mortgage.* Test is amount of the tax in capital.

Breaux vs. Recorder of Mortgages, 36 A. 742; State ex rel. Forman vs. Recorder, 33 A. 14.

And aggregate of tax inscriptions complained of will fix jurisdictional amount.

Palmer vs. Assessors, 42 A. 1122.

6. *Action by syndic of insolvent to annul contract operating unjust preference in favor of one creditor.* Test is value of property.

Black, Syndic, vs. McStea, 37 A. 620.

7. *Action involving title to property.* Test is value of property. Thus—

(a) *Petitory action.*

Mower vs. Judges, 42 A. 665; Hall vs. Curtis, 39 A. 504; Rhodes vs. Black & Davis, 34 A. 406; Peyton vs. Robertson, 9 Wheat. 527.

Rents and revenues when sued for are added to make up jurisdictional amount.

Edwards vs. White, 34 A. 989.

And value of property is test, when suit is brought for liquidation of partnership coupled with one for ownership of property in hands of third person.

McLeod vs. Simonton, 39 A. 853.

(b) *Injunction of seizure by third person claiming ownership.*

Gogreve vs. Windtherst, 21 A. 296; Henry vs. Tricou, 36 A. 519; 28 A. 18; Adams vs. Stark, 33 A. 304; Elder vs. City, 31 A. 500; Simonds vs. Judge, 24 A. 424; Succession of Rennely, 15 A. 661; Testart vs. Belot, 33 A. 603; Francisco vs. Gauthier, 35 A. 393; Thompson vs. Lemelle, 32 A. 932; State vs. Judge, 12 A. 48; Wood vs. Rocchi, 32 A. 1120; Meyer, Wels & Co. vs. Logan, 33 A. 1055.

(c) *Seizure by garnishment of property worth \$600, when contest is between plaintiff and garnishee.*

Wood, Slayback & Co. vs. Rocchi, 32 A. 1120; Bier vs. Gautier & Godchaux, 35 A. 207; Meyer vs. Logan, 33 A. 1055; Leverich vs. Dullin, 23 A. 506.

Garnishee can not appeal unless amount involved between him and each of several plaintiffs exceed appealable sum.

Collins et al. vs. Miss. & Mexican Gulf Ship Canal and Draining Co., 26 A. 276.

(d) Rule by purchaser at tax sale to be put in possession.
State ex rel. Hollander vs. Judge, 28 A. 724.

(e) Or to compel sheriff to make deed.
Pasley vs. McConnell, 29 A. 1098.

(f) Injunction of execution, on ground that property is a homestead.
Guss vs. Rounton, 23 A. 1046.

8. *Action of boundary.* Test is value of land included between contested lines.

Lombard vs. Belanger, 35 A. 811; State ex rel. Levett vs. Lapeyrolerie, 33 A. 264; Hite vs. Hinsell & Tallien, 29 A. 114.

9. *Nullity of judgment.* Amount of judgment, not grounds of nullity or value of property or claim in damages, is test of jurisdiction.

Singer vs. McGuire, 40 A. 638; State ex rel. Adams vs. Judge, 41 A. 15; 18 A. 398; Denegre vs. Moran, 35 A. 247; Same vs. Same, 26 A. 61; Oglesby vs. Helm, 26 A. 61; Mullen vs. Zuberbie & Behan, 29 A. 105; Marshall vs. Holmes, 39 A. 813; Mackenzie Case, 39 A. 508.

And several judgments will not be added for purposes of appeal.

Stevenson vs. Weber, 29 A. 106; State ex rel. Mackenzie vs. Judge, 39 A. 508; Provost vs. Craig, 5 N. S. 57; Marshall vs. Holmes, 39 A. 813; United States vs. Cochran, 5 R. 120; Armistage vs. Barrow, 10 A. 78.

10. *Injunction of judgment by seized debtor.* Test is amount of judgment, not value of property or damages claimed.

State vs. Judge, 18 A. 398; Hearsey vs. Booth, 23 A. 300; Stubbs vs. McGuire, 33 A. 1089; Munday vs. Lyons, 25 A. 990; Francisco vs. Gasthier, 35 A. 398; Smith vs. Mutual Ins. Co., 33 A. 1071; Holland vs. Duchamp, 12 A. 784; Story vs. Jones, 14 A. 73; Cushing vs. Sambola & Ducros, 30 A. 427; Gayarre vs. Hays, 21 A. 307; Michoud vs. Nolas, 2 A. 117; Poree vs. Valliche, 15 A. 292; Bruneau vs. Houghton, 16 A. 67; State ex rel. Elder vs. Judge, 30 A. 229.

11. *Ejectment.* Test is value of unexpired term of lease running from first demand for possession, when there is no money demand.

Bierne vs. Gill, 24 A. 7; Ellis vs. Silverstein, 26 A. 47.

12. *Suit to enforce judicial mortgage.* Test is amount of mortgage, not value of land.

Endom vs. Ludeling, 24 A. 1024; Loeb & Bloom vs. Areat, 23 A. 105; Fendler vs. Bates, 24 A. 506.

Amount realized on one of several judgments sought to be enforced by hypothecary action must be imputed to that judgment and not to interest on all the judgments.

Meyer vs. R. R. Co., 35 A. 896.

13. *Exemption suits, e. g., homestead.* Test is value of property sought to be exempted.

Guss vs. Ronton, 33 A. 1046.

14. *Suit in rem.* Test is amount *bona fide* claimed in petition and not value of property or amount of judgment.

Kahn & Bigart vs. Sippilli, 35 A. 1039.

15. *Action to cancel donation.* Value of property is test.

Boggs vs. Hayes, 44 A. 839.

16. *Injunction by tax-payer of seizure and sale for taxes.* Test is amount of taxes.

Minor vs. Budd, 38 A. 99; Aymar vs. Bourgeois, 36 A. 392; Shannon vs. Lane, 33 A. 491; Marsh vs. Briant, 9 R. 7.

17. *Intervention.* Value of things seized whose ownership is claimed is test of jurisdiction.

Flash, Lewis & Co. vs. Schwabacher & Co., 32 A. 356; Jennings vs. Con-
nico, 25 A. 631; Schlieder vs. Martinez, 38 A. 847; but see Picard &
Well vs. Wade, 30 A. 625, where amount of plaintiffs' claim is said
to fix intervenor's right of appeal; Walsh vs. Carrene, 36 A. 199.

- (a) Intervenor may appeal when his claim is for less than jurisdictional amount provided plaintiff's claim be for more.

Id.; 24 A. 442; 22 A. 331; 22 A. 298; 21 A. 366; Alter vs. O'Brien, 31 A.
452; Picard & Well vs. Wade, 30 A. 625; Colt vs. O'Callaghan, 2 A.
189; Hart vs. Ludwick, 8 L. 166; Buckner vs. Baker 11 L. 462; 16
A. 480.

- (b) And where several intervenors join, aggregate amount is test.

Colt vs. O'Callaghan, 2 A. 984.

- (c) Plaintiff's claim determines appealability as to him.

Walsh vs. Carrene, 36 A. 199.

18. *Third opposition.* Rule same as in intervention, viz.: plaintiff's demand is test of jurisdiction.

Hart vs. Ludwick, 8 L. 164; Picard & Well vs. Wade, 30 A. 625; Alter
vs. O'Brien, 31 A. 452; State ex rel. Seymour vs. Judges, 34 A. 1047;
Broadwell vs. Smith, 28 A. 172; Gee vs. Thompson, 39 A. 310.

- (a) But where third opponent claims ownership of specific item of property, value of such property is test.

Wickham & Pendleton vs. Nalty, 42 A. 423; Meyer, Weis & Co. vs.
Logan, 33 A. 1055; Schlieder vs. Martinez, 38 A. 847.

- (b) But where third opponents do not claim specific property but merely seek a ranking privilege, their cases involve a distribution of funds held by sheriff and the amount of the fund fixes appeal.

Walsh vs. Carrene, 36 A. 199; Renshaw vs. Stafford, 34 A. 112.

19. *Demands in reconvention.* Case may be appealed on reconventional demand when amount sufficient though plaintiff's claim be not appealable.

Gore vs. Kendig, 8 R. 387; Hanna vs. Bartlette, 10 R. 436; Goodlone vs. Glendower, 11 R. 12; Pesant vs. Heardt, 22 A. 232; Picard & Well vs. Wade, 30 A. 626; Lamore vs. Avery, 32 A. 1008; Colomb & Gondolo vs. McQuaid, 36 A. 371; Vincent vs. Schweitzer, 17 A. 199; Defee vs. Covington, 37 A. 659; Ryan vs. Bindley, 1 Wall. 66; Goldman vs. Ross, 38 A. 152; Stevenson vs. Whitney, 33 A. 659; Livingstone vs. Hardie Bros., 41 A. 811.

- (a) Where demand in reconvention unfounded and plaintiff's demand not appealable, appeal dismissed.

Gagne vs. Barrow, 15 A. 135.

- (b) And where reconventional demand is below jurisdiction of Supreme Court, appeal dismissed.

Stevenson vs. Whitney, 33 A. 655; Dean vs. Clark, 5 A. 105; Tardos vs. Toulon, 14 A. 429; Prejean vs. Leocompte, 41 A. 747; 41 A. 751.

- (c) Main and reconventional demand will not be added to give jurisdiction.

State ex rel. Bobet Bros. vs. Judge, 42 A. 1064; Prejean vs. Leocompte, 41 A. 747; Smith vs. Ins. Co., 38 A. 1072.

20. *Suit on note.* Amount of note and attorney's fees, if any stipulated, test of jurisdiction.

Mayer vs. Stahr, 36 A. 58.

21. *Possessory action or demand of like nature.* Value of possession is test.

Young vs. Wilson, 34 A. 398; R. R. Co. vs. McCloskey, 35 A. 785; Slawson vs. Meggett, 22 A. 272; Harris vs. Stockett, 35 A. 387.

22. *Action of partition and succession matters, or when sheriff holds proceeds of sale.* Fund to be distributed is test.

Walker vs. Barrow, 43 A. 863; Gray vs. Gray, 36 A. 868; Succession of Lessasier, 34 A. 1066; Succession of Thomas, 35 A. 819; Succession of Andres, 34 A. 1068; Succession of Gale, 21 A. 487; State ex. rel. Hickman vs. Judge, 28 A. 963; Succession of Cloney, 29 A. 826; Succession of McDowell, 35 A. 1025; Succession of Duran, 34 885; Hougherty vs. Thieberge, 24 A. 442; Lapene & Ferre vs. Miguel, 36 A. 89; Renshaw Case, 34 A. 1140; Renshaw vs. Stafford, 33 A. 1128; Succession of Scott, 41 A. 669; 45 A. 156; 44 A. 819; Ruthenberg vs. Heiberg, 43 A. 410; 41 A. 620; Ins. Co. vs. Levi, 40 A. 185.

- (a) But where actual fund is below two thousand dollars, but administrator asks approval of a compromise of which actual cash fund is the result, Supreme Court will have jurisdiction where the uncompromised claim or asset exceeds the upper limit.

State ex rel. Muse vs. Judge, 33 A. 215.

- (b) Succession or insolvent representative can not by filing separate accounts reduce fund to be distributed in each below appellate jurisdiction.

Brierre & Sons vs. Creditors, 43 A. 423, 976.

- (c) Where no fund to be distributed remains, claim of creditor is test of jurisdiction.

Succession of Pointer, 30 A. 370; Succession of McDowell, 35 A. 1026.

- (d) Fund to be distributed by administrator of a deceased administrator is not the test of right of appeal when appellant opposed his account because the deceased administrator was liable for the loss of certain real estate belonging to former succession, which by his negligence was sold for taxes. Opposition was a separate cause of action enforceable by direct action.

Succession of McKnight, 44 A. 899.

- (e) And after homologation of account so far as not opposed, the right of appeal will depend upon amount of opposed items.

Succession of Wellmeyer, 34 A. 821.

23. *Action for account.* Alleged amount due is test, and when demand is on administrator, fund to be distributed is test.

Denegre vs. Moran, 35 A. 346; Teal vs. Pirtle, 34 A. 892; Allen, West & Bush vs. Nettles, 39 A. 788.

But when defendant admits a certain sum, amount in dispute is the difference between their figures.

Denegre vs. Moran, 35 A. 347; Girardey vs. City, 26 A. 291.

24. *Suits against several defendants not bound jointly or severally.* Test is amount of claim against each.

Tague vs. Ins. Co. et als., 38 A. 456; La. Western R. R. Co. vs. Hopkins et als., 33 A. 806; Larrieux vs. Slaughterhouse Co., 30 A. 609; Broadwell vs. Smith et al., 28 A. 172; 10 A. 78; United States vs. Cochrane et als., 5 R. 120; Merritt vs. Hozey et al., 4 R. 319; 5 N. S. 87; Stevenson vs. Weber et al., 29 A. 108; Bazoni vs. Marcera, 18 A. 136; but see Marshall & James vs. Fall, 9 A. 92.

- (a) But where heirs are sued by attorney for settling succession, test is total claim against all.

Lartigue vs. White et als., 25 A. 291; 25 A. 325.

- (b) And where two defendants are sued jointly but whole claim is denied by each, the entire demand is test.

Dalcour vs. McCan, 37 A. 9; School Board vs. Cousin, 51 A. 207; St. Cyr vs. Jumel, 84 A. 201.

25. *Suits by several plaintiffs not partners or otherwise associated against one or more defendants.* Test is amount sued for by each one or demanded from each one, not aggregate sum.

Larrieux vs. Slaughterhouse Co., 30 A. 609; Stevenson vs. Weber, 39 A. 108; Dyas vs. Dinkgrave, 15 A. 503; Broadwell vs. Smith et als., 21 A. 172; but see Heira of Baillio vs. Prudhomme et al., 8 N. S. 538, and Bowman et als. vs. City of New Orleans, 27 A. 501, where it is held that plaintiffs having joined for convenience and economy can not sever to deprive defendant of appeal; see *State ex rel. Murtagh et als. vs. Judge*, 28 A. 761.

And where claims of several plaintiffs arise from one contract, which is an entirety and which is more than appealable sum, they may appeal.

Ready vs. City, 27 A. 170.

26. *Consolidation of distinct suits.* Test is the demand in each suit.

La. Western R. R. Co. vs. Hopkins et al., 33 A. 806; Bazoni vs. Marcora, 18 A. 136; Harrison & Harrison vs. Moss & Co., 41 A. 233.

Where consolidation clearly by consent.

See *Marshall & James vs. Fall*, 9 A. 92.

27. *Injunction of several judgments.* Test is amount of each judgment.

United States vs. Oochrane et als., 5 R. 120; 5 N. S. 87.

28. *Suit against sureties severally bound.* Test is demand against each.

Merritt vs. Hozey et als., 4 R. 219.

29. *Suit to levy tax to pay judgment.* Test is amount of judgment.

Hajat vs. Police Jury, 28 A. 283; 15 A. 420.

And where same plaintiff holds several judgments, test is aggregate amount of all.

Pease vs. Police Jury, 34 A. 157.

30. *Suit to enforce a right.* Value of the right, independent of damages claimed for particular invasion, is the test.

R. R. Co. vs. Hamilton, 15 A. 521; Mrs. D'Arcy vs. Judge, 25 A. 621; Williams vs. Vance, 2 A. 909.

31. *Suit for alimony.* Test is amount party on appeal has to pay or receive during the term, not particular amount actually demanded.
State ex rel. Holbrook vs. Judge, 24 A. 601.
32. *Demand in warranty.* Sum demanded may be test or total value of right when actual sum asked is only part accrued.
R. R. Co. vs. Hamilton, 15 A. 521; Huntington vs. Bordeaux, 42 A. 346.
33. *Dissolution of attachment.* Amount of plaintiff's claim is true test.
Yale & Bowling vs. Routh, 38 A. 895.
34. *Action by tax-payers to annul contract by city or parish.* Value of contract is test.
Murtagh vs. Judge, 28 A. 761; Handy vs. City, 39 A. 107; but see Dugan vs. Police Jury, 26 A. 678, where appellants in such cases must clearly show appealable interest.
35. *Suit for recovery of live stock and for use of stock until delivery.* Test is highest judgment that can be rendered.
Forstall vs. Larche, 39 A. 286.
36. *Suit for injunction coupled with allegations of damages.* Test is amount of damages alleged and value of right invaded.
Levine vs. Michel, 35 A. 1121; Crescent City Live Stock and Slaughterhouse Co. vs. Lairieux, 30 A. 798; Gay vs. R. R. Co., 31 A. 274; Soares vs. Hebrew Congregation, 31 A. 205.
37. *Contest of two parties for priority of execution.* Amount of judgment is test.
State ex rel. Mackensie, 39 A. 509.
38. *In expropriation suits against several defendants.* Value of land of each defendant is test.
Louisiana Western R. R. Co. vs. Hopkins et. als., 33 A. 606; R. R. Co. vs. Barton, 48 A. 173.
39. *Suits on accounts or for damages.* Amount bona fide claimed—not judgment rendered below—is the test.
Hendricks vs. Wood, 33 A. 1051; Calder vs. Police Jury, 44 A. 175; Levy vs. Collins, 32 A. 1004; Forstall vs. Larche, 39 A. 287.
40. *Injunction against selling drugs and medicines within certain limits.* Test is amount alleged as damage.
Kelly vs. Bernstein, 34 A. 1026.
41. *Suit to enforce attorney's privileged claim on judgment.* Test is attorney's fee—not amount of judgment.
Young vs. Duncan, 39 A. 86.

42. *Suit on stock note.* Amount of note is test—when any and all liability is denied. Particular instalment sued for is not the test.

Peychaud, Liquidator, vs. Weber, 25 A. 133.

43. *Suit on one of a series of notes.* Test is amount of whole series when entire contract is attacked.

Williams vs. Vance, 2 A. 309.

44. *Action to interpret judgment.* Amount of original judgment is test, except where the interpreting judgment incorporates something in it.

Ins. Co. vs. Harbor Protection Co., 39 A. 563.

45. *Suit involving title to office.* Amount of salary or fees or emoluments.

Coltharp vs. Holmes, 43 A. 1199; *Buckner vs. Jastremski*, 33 A. 119; *State ex rel. Leche vs. Fowler*, 41 A. 330, 405; *Newman vs. Hayles*, 2 A. 1135.

And where one party has appealable interest at issue, the other party is *ipso facto* vested with same right.

Handy vs. New Orleans, 39 A. 107; *Ready vs. New Orleans*, 7 A. 169; *State vs. Judge*, 24 A. 595; *Murtagh vs. Judge*, 23 A. 761.

46. *Accounts of tutorship.* Fund to be distributed is test.

Tutorship of Jones, 41 A. 620; *Martine vs. Hopkins*, 40 A. 322.

47. *Contest over funds in sheriff's hands resulting from sale.* Amount to be distributed is test.

Ins. Co. vs. Levi, 40 A. 135; *Benshaw vs. Stafford*, 34 A. 1123.

48. *Emancipation proceedings.* Amount of estate of minor, particularly when coupled with affidavit that minor's interest in result exceeds \$2000.

Emancipation of Pocheln, 41 A. 331.

49. *Action to annul dation en paiement.* Test is value of property.

Queyrrouze & Bois vs. Thibodeaux, 30 A. 1115.

50. *Garnishment.* Test is liability of each garnishee in contest between him and attaching or seizing plaintiff.

Bank vs. Allen, 39 A. 307; *Marshall vs. Holmes*, 39 A. 313; *Wood, Starbuck & Co. vs. Bocchi*, 32 M. 1120.

51. *Proceedings to recover costs.* Amount of costs is the test, where the account had been already homologated.

Succession of Dougart, 42 A. 516.

52. *Suit to annul tax sale.* Test is value of property.

State ex rel. Nores vs. Judge, 42 A. 590.

53. Forfeiture of an appearance bond. Test is grade and character of crime charged against accused.

State vs. Cornig, 42 A. 417; 7 A. 276; State vs. Williams, 37 A. 200; State vs. Burns, 38 A. 868; State vs. Doyle, 42 A. 640; State ex rel. Society for Prevention of Cruelty to Children vs. Cage, 45 A.

54. Contest over funds in hands of sheriff resulting from sale of attached property. Amount of fund is test.

Adler & Co. vs. Cannon, 42 A. 835.

(U) Elements of demand which must not be considered to compute appealable amount:

1. All claims for damages:

(a) When clearly fictitious.

45 A. 888; 42 A. 455; 38 A. 801; 37 A. 541; 36 A. 287; 44 A. 425; 26 A. 678; 24 A. 117; 21 A. 198; 39 A. 504; 41 A. 1142; 41 A. 806; Ribet vs. Contreras, 28 A. 18; Samorini vs. Mallard, 35 A. 260; Pritchard vs. Gaudin, 21 A. 745; 41 A. 1014; 21 A. 198; 10 A. 282; 4 A. 218; Wade vs. London, 30 A. 680; 41 A. 956.

(b) In action of nullity of judgment.

Smith vs. Ins. Co., 33 A. 1072; Cushing vs. Sambola & Dueros, 30 A. 426; Lemle vs. Routon, 33 A. 1007; Poree vs. Valisch, 15 A. 292.

(c) In injunction of execution judgment.

Hearsey vs. Booth, 33 A. 800; Holland vs. Duchamp A. 784.

(a1) By one of the parties.

Bruneau vs. Haughton, 16 A. 47; Stubbs vs. McGuire et al., 33 A. 1090.

(b1) Or by a third person.

Thompson vs. Lemelle, 32 A. 933; Dejean vs. Hebert et al., 31 A. 729.

(c1) Remedy is by action on injunction bond.

Id.

2. Costs. Subsequently accruing costs not element of jurisdiction.

Oglesby vs. Helen, 25 A. 61; Frellsen vs. Copley, 2 A. 911; Mason vs. Oglesby, 2 A. 793; Walker vs. United States, 4 Wall. 163; Gordon et al. vs. Ogden, 3 Peters, 38.

(a) Not even costs of original suit when action is of nullity of that judgment.

Oglesby vs. Nelson, 26 A. 61.

(b) But costs and interest added to principal demand in suit against surety of foreign non-resident arrested.

State ex rel. Redwitz vs. Judge, 28 A. 110.

3. *Interest.* Interest accruing after judicial demand.

Mason vs. Oglesby, 2 A. 738.

(a) See "exclusive of interest" *ante*.

5 R. 90; 1 R. 26; 9 R. 153.

(b) Interest up to judicial demand on capital should be considered.

See 24 A. 95; *contra* see Breaux vs. Recorder, 36 A. 742; Schlenker vs. Tallaferrro, 20 A. 565; Mann & Co. vs. Norton, 21 A. 126; Jaquet vs. Webb, Levert & Co., 22 A. 111.

4. *Fictitious and exorbitant claims.*

Gagne vs. Barrow, 15 A. 135; King vs. Reed, 7 A. 492; Cabrera vs. Dinkgrave, 6 A. 735; Marsh vs. Briant, 9 R. 7; Frellsen vs. Copley, 2 A. 321; Vogel vs. Retand et al., 4 A. 213; Copley vs. Ross, 1 A. 311; Dabbs vs. Stevens, 8 R. 143; Orillon vs. Slack, 17 L. 103; Red River R. R. Co. vs. Williams, 16 L. 183; Thornhill vs. Lloyd & Frierson, 10 A. 232; Black vs. Kearney, 43 A. 381.

But fictitious nature of claim must clearly appear.

Goodrich vs. Newell, 43 A. 373.

(V) *Items to be considered in determining appellate jurisdiction:*

1. *Interest—when considered.* Interest on judgment tax to pay which is sought to be levied which accrues up to judicial demand.

Schlenker vs. Tallaferrro, 21 A. 566; State ex rel. Flak vs. Police Jury of Jefferson, 24 A. 95; Bank of United States vs. Daniel, 12 Peters, 32.

Interest at 8 per cent. on note can not be allowed when plaintiff demands only 6 per cent.

Citizens' Bank vs. Condran, 22 A. 53.

2. *Attorney's fees on notes.* Such fees are part of demand.

Standifer & Co. vs. Covington, 25 A. 896; Mayer vs. Stahr, 35 A. 33.

3. *Reconventional demand alone*, when case is remanded to be tried upon that issue.

Davenport vs. Knox, 25 A. 486; 25 A. 806; 28 A. 172; 18 A. 136.

(W) *How jurisdictional amount determined:*

1. *By petition* when claim is *bona fide*, and not clearly frivolous.

R. R. Co. vs. McCloskey, 35 A. 785; Brown vs. Bagland, 34 A. 1026; State ex rel. Hargrove vs. Judges, 37 A. 372; Young vs. Wilson, 34 A. 886; LeBlanc vs. Pitman & Barrow, 16 A. 430; McKee vs. Ellis, 2 A. 167; Succession of Stafford, 12 R. 178; Phillips vs. Stanley, 1 L. 266; Maxen & Shearer, vs. Landrum, 21 A. 366; Blum, Stern & Co. vs. Sallis, 24 A. 118; Burke vs. Wall, 29 A. 58; Lee vs. Watson, 1 Wall. 337; 25 A. 201; 29 A. 286; 33 A. 583; 15 A. 120; 23 A. 34; 25 A. 566; 25 A. 43; 32 A. 1004.

2. By *pleadings and nature of action*, not by appellant's affidavit and jurisdictional allegations.

Buddig vs. Baldwin, 38 A. 394; Wilkins vs. Gantt, 52 A. 929; State ex rel. Crean vs. Bouny, 52 A. 1191; State ex rel. Police Jury vs. Miscoar, 34 A. 384; Dugan vs. Police Jury, 26 A. 678.

Amount stated in statement of facts will not take away jurisdiction where pleadings show appealable amount.

Connors vs. Ins. Co., 22 A. 330.

3. By *petition as affected by remittitur* entered before judgment.

See "*Remittitur*," *ante*; State ex rel. R. R. Co. vs. Judge, 34 A. 364.

(a) And by supplemental petition which states value of property in dispute.

Martine vs. Hopkins, 40 A. 322; Groebel vs. Ristroph, 35 A. 490.

(b) *Aliter* where supplemental claim merely inflates the demand for jurisdictional purpose.

Buddig vs. Baldwin, 38 A. 396; March vs. McNelly, 36 A. 287.

4. By *total claim in petition*, not by *isolated items*. Thus, court has jurisdiction in suit for levy of tax to pay several judgments, though amount of each be less than appealable sum, if aggregate amount is appealable.

Pease vs. Police Jury of Jefferson, 34 A. 137.

(X) *Tests of value:*

Insurance on property; assessment; rental.

Werlein vs. Ins. Co., 30 A. 1399; Maumus vs. Reynet, 31 A. 462.

876. Appellate Jurisdiction Continued—It has also jurisdiction by appeal of the appointment of tutors or curators of minors, interdicted or absent persons, or of vacant estates, or of syndics of the creditors of an insolvent, if the property which is to be placed under the charge of such tutors, curators, or syndics amount to more than five hundred dollars.

(*Inoperative as to amount named*).

877. Grant of All Necessary Powers—The Supreme, as well as other courts, possesses the powers which are necessary for the exercise of the jurisdiction given to it by law, in all the cases not expressly provided for by the present Code.

*(A) General grant of powers necessary to exercise jurisdiction.
Under this article Supreme Court has power :*

1. To order clerk to complete transcript defective by his fault.
Trounistine & Co. vs. Ware & Munn, 33 A. 790; Edson vs. McGraw, 17 A. 294; Todd vs. Gordy, 29 A. 501.
2. To order clerk to sign certificate.
Michel vs. Meyer et al., 27 A. 173.
3. To issue preliminary orders necessary to exercise supervisory jurisdiction.
State ex rel. Behan vs. Judge, 35 A. 1077.
4. To make all necessary new parties, as where defendants officials have been succeeded in office.
Planters' Bank Case, 2 A. 480; State ex rel. Canal Co. vs. City, 3 A. 70.
5. To compel lower judge by mandamus to fix return day of appeal earlier when that fixed is so remote that judge's action amounts to denial of justice.
State vs. Judge, 9 A. 15.

(B) Power to issue restraining orders :

1. When order will issue:
When Supreme Court mandamuses lower judge to issue injunction, it will issue a temporary restraining order to have the effect of the injunction denied.
State ex rel. Murray vs. Judge, 36 A. 573.
2. When it will not issue:
When party asking for restraining order can obtain adequate relief in lower court.
State ex rel. Jaffray & Co. vs. Judge, 39 A. 1108.

878. May Issue All Necessary Orders—It may direct to courts immediately under its jurisdiction, not only such mandates as mentioned in the second section of the tenth chapter of the preceding title, for the purpose of insuring the better administration of justice, but also such as it shall judge necessary to enable it to exercise the appellate jurisdiction, which it has over those courts.

879. Dockets—Preference Cases—The Supreme Court shall have a docket to be called the summary docket, on

which the clerk of the said court shall enter in the order in which they are filed, all cases involving the distribution of money or effects in the hands of executors or other representatives of successions, funds or effects in the hands of a sheriff or other public officer, received in his official capacity, or amounts retained out of the price bid by a purchaser at sheriff's sales; also, funds or effects in the hands of syndics of insolvents or receivers appointed by order of court; also, funds or effects in the hands of a garnishee or depositary against the same, and in all cases where the constitutionality or legality of any State, parish, or municipal tax is called in question, or in which the collection of any such tax is delayed or obstructed by any legal process, or where the right to office is in contest; and preference shall be given in the trial of other cases, in the order prescribed by special laws.

(A) Dockets of Supreme Court:

R. S. 1915.

Summary docket. Cases which shall be placed on summary docket:

1. All cases for divorce or separation from bed and board; all cases for the recovery of wages, salary or compensation for personal or professional services.

Act 15 of 1880.

2. All cases in which payment is sought of any bill, note, or other written unconditional obligation to pay money.

Act 22 of 1878.

3. All criminal cases.

Sec. 4 of Act 30 of 1878, and Sec. 1 of Act 17 of 1876.

4. By Act 17 of 1876: Summary trial is directed on appeal in—

- (a) All civil cases when the State is a party through its authorized counsel;
- (b) All cases in which the constitutionality or legality of any State, parish or municipal tax is in question or its collection delayed or obstructed by legal process;
- (c) All cases in which the right to public office is involved;

- (d) All cases involving the distribution of money or other property in the hands of executors or other representatives of successions; or in the hands of sheriffs or other public officers, or of receivers or garnishees;
- (e) All cases involving the validity of wills, or cases in which parties as heirs claim to be put in possession of property, money or effects of a succession;
- (f) All cases for the expulsion of tenants under the act relative to "landlords and tenants," approved March 15, 1855;
- (g) All appeals from judgments for the payment of alimony, from judgments upon awards of arbitration, amicable compounders, or referees; and from judgments against sureties on judicial bonds and injunction cases.

5. All cases involving distribution of funds or effects in the hands of syndics of insolvents or amounts retained out of the price bid by a purchaser at sheriff's sales.

Act 70 of 1872.

(B) *Ordinary docket:*

Act 28 of 1880: "In fixing causes for trial, the Supreme Court of the State of Louisiana shall assign at least one-half the number from the ordinary docket; provided, all cases in which the State is plaintiff shall have preference."

880. Adjournment—The Supreme Court may be adjourned by one of its judges from day to day, until a sufficient number to try causes be collected.

Section 13 of Act 45 of E. S. 1870: "The Supreme Court may be adjourned from day to day by one or more of its judges until a quorum be convened; and if neither (none) of the judges be present on the day fixed by law for the commencement of the term, the clerk may adjourn it in like manner for ten days."

881. Recusation—The judges of the Supreme Court may be challenged in the same manner, and for the same causes, as the judges of original jurisdiction; they must conform to all the rules of procedure established above, and which are applicable to them in every thing not other-

wise provided for under the present title, or which may hereafter be provided for by law.

C. P. 883, *et seq.*

882. Mode of Appealing—The mode for obtaining an appeal to the Supreme Court, and the effect of such appeal, are established by the general rules in matters of appeal, contained in the second section of the sixth chapter of the preceding title.

See Act 45 of E. S. 1870.

883. Failure to File Transcript—Execution—If the appellant has not filed in the Supreme Court, on the day appointed by the inferior judge, the record from the court below, and was prevented from doing so by any event not under his control, he may either in person or by attorney apply to the court before the expiration of three days, after which the appellee may obtain a certificate from the clerk declaring that the record has not been filed, and may demand a further time to bring it up, which may be granted by the court if the event causing the delay be proved to its satisfaction; the court may even grant an injunction to the appellant, during the further time allowed, to suspend the execution on the judgment appealed from, if, at the time of petitioning for such further delay, the appellee has already required of the clerk the certificate necessary for the pursuit of such execution.

(A) Failure to file transcript:

1. Appeal dismissed where transcript not filed within three judicial days after return day, and no valid extension of time granted.

Holz vs. Fishel et al. 40 A. 295; *Redmond vs. Mann*, 28 A. 873; *Brickell vs. O'Connor*, 10 A. 235; *Farmers, etc., vs. Strawbridge*, 24 A. 126; *Vancampen vs. Morris*, 6 R. 79; *Palfrey vs. Winter*, 8 L. 206; *Pond vs. Horton*, 17 L. 197; *Rhea vs. Steamer Simonds*, 15 A. 712; *Laeroix vs. Bonin*, 33 A. 119; *Pierce vs. Cushing*, 33 A. 401; *DeBouchel vs. Husband*, 34 A. 102; *R. R. Co. vs. Hood*, 3 A. 226; *Police Jury vs. Garrett*, 19 A. 122; *Copley vs. Routh*, 3 A. 189; *Cousin vs. Johnson*, 21 A. 210; *Dalton vs. Viasco et al.*, 18 A. 651; 10 A. 75; 4 A. 350; *Moriere vs. Robinson & Jones*, 20 A. 229; *Verret vs. Gaudin*, 28 A. 138; *French vs. Commissioners*, 9 A. 21; *Ducourneau vs. Levistones*, 3 A. 245; *Wood & Roane vs. Wood*, 52 A. 804.

2. Where return day does not fall within a term, filing of transcript is in time if on first day of next term.
Lefebvre vs. Hayne, 21 A. 668; 18 L. 574.

(B) Essential conditions precedent for protection of appellant for failure to file transcript in time:

1. His application for extension must be within three days after return day.

Holz vs. Fishel et al., 40 A. 295; Redmond vs. Mann, 23 A. 573; Succession of Bergold, 23 A. 574; Kohn vs. Davidson, 23 A. 467.

2. His application must be specifically for extension of time, not mere prayer for writs of certiorari, mandamus and prohibition.

Holz vs. Fishel et al., 40 A. 295.

3. His application must be acted on and granted.
Id.

4. Application must be supported by affidavit of clerk of lower court, or of counsel or of mover.
Id., p. 296.

5. Application must have been allowed by Supreme Court. Lower court has no power to extend time.

DeBouchel vs. Husband, 34 A. 108; Harbor vs. Brickell, 19 R. 61.

6. Failure to file transcript must be caused by some event not under appellant's control. The following grounds are not sufficient:

- (a) That appellant could not furnish bond.
Sterling vs. Heirs of Sterling, 34 A. 1080.

- (b) That clerk had not sufficient time to prepare transcript where appellant instructed him three months before return day not to make transcript.
Gibert vs. Tassin, 37 A. 739.

- (c) That appellant's counsel was absent on public business.
Wright vs. Brander, 17 A. 188.

- (d) That clerk's office was closed earlier than usual on return day.
Buckley vs. Lacroix, 14 A. 23.

- (e) That clerk of district court did not send up record in time according to standing agreement between him and counsel.

Brother vs. Bank, 10 A. 147; McDowell & Peck vs. Read, 1 A. 2.

7. All conditions for appealing must be fulfilled. Extension not granted when object is to perfect appeal, as—

By furnishing bond.

Mathon vs. Berry, 35 A. 334.

(C) *When extension of time begins to run. Extension runs from—*

1. The three judicial days allowed by law after return day.

Deianey vs. Rochereau & Co., 34 A. 1123.

2. From time of application; thus where application for fifteen days' extension filed with clerk on 6th December, and court not being then in session, is acted on and granted on 18th, delay expires December 21, not December 23.

Chretien vs. Polney, 33 A. 132; 31 A. 162.

(D) *Extension runs to what time?*

1. To the last day, when that expires in term time, though it be a *dies non*.

Insurance Co. vs. Bynum, 32 A. 29; *Bienvenu vs. Ins. Co.*, 28 A. 301; but see *State ex rel. Luling vs. Judge*, 24 A. 333, where original return day being *dies non*, filing on following day is timely. See *Wood & Roane vs. Wood*, 32 A. 304.

2. To first day of next term when extension expires in vacation.

Smith vs. Foster, 5 A. 551; *French vs. Harrod*, 9 A. 21.

(E) *Orders for extension granted after legal delays are null and may be rescinded.*

Lacroix vs. Bonin, 33 A. 119.

884. Failure to File Transcript—Rights of Appellee—

But if the appellant has not obtained a further delay, and has not filed in the Supreme Court a copy of the record on the day directed by the court below, the appellee may either proceed with the execution on the judgment appealed from, or he may bring up a copy of the record himself, and have judgment on the appeal, in the manner provided in the second section, sixth chapter of the present title.

(A) *Appellee's remedy where appellant fails to file transcript in time is twofold:*

1. He may proceed with execution of judgment.

C. P. 383.

- (a) For that purpose he may rule clerk of Supreme Court to deliver certificate provided for by C. P. 589.
Lacroix vs. Bonin, 33 A. 119.
 - (b) Appellee can not proceed with execution if transcript be filed at any time before application for certificate.
Traverso et al. vs. Row et al., 10 L. 501; 4 L. 67.
 - (c) *Pari ratione*, he can not move to dismiss appeal.
Decoux's Heirs vs. Plantivignes, 10 L. 504.
2. Appellee may have judgment on the appeal.
C. P. 590.
- (a) But appeal not entertained if not taken within the prescriptive period.
New Orleans vs. Adams, 28 A. 15.
 - (b) Appellee can not bring up record and have judgment when appellant abandons appeal and enforces judgment.
Snyder et al. vs. Collins, 30 A. 1237; Savoie vs. Thibodaux, 31 A. 52; but see St. Rome vs. Levee Steam Cotton Press Co. 1 A. 224.

885. Rights of Appellee, etc.—The appellee shall have the same right in case the appellant has obtained further time to bring up the record, and has failed to do so within the time.

886. Motion to Dismiss—Answer to Appeal—If a copy of the record in the lower court, and the papers belonging to it, have been filed in the Supreme Court, the appellee shall, within three days after the time allowed him for appearance by the citation of appeal, file with the clerk his answer in writing to such appeal.

(A) Motion to dismiss—when filed:

Motion to dismiss appeal must be filed—

- (a) Within three days after filing of transcript, otherwise too late.

Murison & Co. vs. Butler, 18 A. 191; 12 A. 745; Mitchell vs. Lay, 1 A. 514; Hall et al. vs. Neville et al., 3 A. 536; O'Reilly vs. Leod, 2 A. 188; Murray vs. Bacon, 7 N. S. 271; Succession of Charnbury, 34 A. 25; Francis vs. Lavine et al., 26 A. 311; Fox vs. Moss, 21 A. 529; Temple vs. Marshall & James, 11 A. 63; 7 A. 676; 6 A. 115; 28 A. 111; 12 L. 480; 24 A. 335; 12 A. 380; Blumens vs. Ins. Co., 33 A. 210; Widow de St. Rome vs. Levee Steam Cotton Press Co., 31 A. 224; Holbrook vs. Holbrook, 23 A. 3 Ford vs. Brooks, 35 A. 151; Webb vs. Keller, 33 A. 35.

(b) Before submission of cause.

Phillips vs. Creditors, 87 A. 701.

(B) Motion to dismiss may be filed at any time for the following causes:

1. That proper parties are not before the court.

Francis vs. Lavine et als., 26 A. 811.

2. That appellant has acquiesced in judgment.

Evans & Taylor vs. Succession of Etheridge, 29 A. 576; James vs. Fel-
lowes & Co., 28 A. 87; 10 A. 643.*(C) When motion will not lie:*

1. When similar motion has been overruled.

Succession of Edwards, 84 A. 220; Duncan vs. Duncan, 29 A. 829.

2. When motion trenches upon the merits of the cause.

Phillips vs. Creditors, 87 A. 701, 541; 41 A. 957; Baker vs. Frellsen, 82 A.
822; State ex rel. Duffel vs. Marks, 80 A. 70; Pasley vs. McConnell, 89
A. 1097.3. But where Supreme Court can not make head or tail out
of transcript, appeal dismissed.

86 A. 827.

4. When sole ground is that mover has been improperly made
a party to the appeal.

Boutte vs. Boutte, 80 A. 177; Succession of Tyson, 21 A. 117.

Or where ground of motion is merely that a former ap-
peal from an interlocutory judgment was taken.

Succession of Planchet, 29 A. 522.

5. When appellee fixed case for trial.

Creedy vs. Breedlove, 12 A. 745; White vs. Maguire, 16 A. 537; 8 R. 168;
8 R. 169.

6. When answer has been filed without reservation.

White vs. Gaines, 27 A. 76; Hoffman vs. Atkins, 11 A. 172; 18 A. 483;
Jones vs. Shreveport, 28 A. 835.7. Where clerk prepares a defective transcript without in-
structions from appellant.

Washburn vs. Frank, 81 A. 427.

8. Where inaccuracies are in certificate of clerk and mere
verbal errors are in bond of appeal.

Pasley vs. McConnell, 40 A. 608.

9. Where ground of motion is that appeal is frivolous.

Thomas vs. Guillbeau, 85 A. 927.

(D) Motion to dismiss must be a formal written motion:

It is not sufficient if made in oral or printed argument except where want of jurisdiction is urged.

Succession of DeForest vs. Lafranche, 7 A. 28.

Or where transcript is defective.

Samach vs. Brownlee, 38 A. 34.

(E) Waiver of motion to dismiss:

1. By appearance and answer.

Claflin vs. Liss & Schoen, 31 A. 171; Jacobs vs. Yale & Bowling, 31 A. 339; 27 A. 284; 3 R. 183; 3 R. 188.

2. By fixing case for trial.

Golden vs. Board of Directors, 34 A. 354; White vs. Maguire, 34 A. 361; Crosby vs. Breedlove, 12 A. 745.

(F) Answer to appeal. What is not an answer:

1. Mere motion to dismiss.

Johnson vs. Jennison, 18 A. 134.

2. Mere brief of attorney.

Methodist Church vs. Dunn, 19 A. 383; Jamison vs. Barell, 21 A. 38. Succession of Decoux, 5 A. 149; Succession of Hilligaburg, 1 A. 18.

(G) When answer filed:

Must be filed three days before argument when reversal of judgment is sought.

Barrett vs. Donovan, 17 A. 182.

887. What Answer May Contain—The appellee, in his answer, may either pray for a simple confirmation of the judgment with costs, or he may pray also for the damages spoken of hereafter.

Demand for damages must appear in answer.

Pecoul vs. DeMahy, 17 A. 126; Cockburn vs. Groves, 17 A. 18; Segal vs. Drumm, 21 A. 8; 3 A. 74.

888. Prayer for Amendment—If the appellee has cause to complain of the judgment appealed from, he may, without appeal on his part, state in his answer the points on which he thinks he has sustained wrong, and may pray that the judgment be reversed with respect to them, and confirmed with costs on the rest.

(A) Prayer by appellee for amendment of judgment:

Where appellee neither appeals nor files answer praying amendment, judgment can not be disturbed in his favor.

Succession of Ostrander, 26 A. 451; Gnotz vs. Easton and Barrow, 26 A. 508; Converse vs. Robinson, 15 A. 434; 6 A. 7; Enders vs. Gingras, Mulhaupt & Co., 33 A. 775; Lynn vs. Lowenthal, 19 A. 527; Wortham vs. Schenck, 10 A. 197; Hood vs. Knox, 8 A. 78; Succession of Decoux, 5 A. 140; Abot vs. Nortique, 8 L. 192; Morris vs. Cain et als., 39 L. 724; State ex rel. De Leon vs. New Orleans, 34 A. 479; Gardere vs. Blanton et al., 35 A. 818; Lange vs. Baranco, 32 A. 699; Holmes vs. Hemken et al., 6 R. 51; Bowman vs. Kaufman, 30 A. 1026; Howard vs. Waggaman et al., 28 A. 99; Lacey & Butler vs. Police Jury, 28 A. 455.

(B) For purpose of securing amendment, formal appeal or prayer for amendment can not be substituted by demand in oral or written argument.

O. P. 907; Jamison et als. vs. Barelli, 20 A. 454; Conery vs. Holmes et als., 18 A. 641; State vs. Becker, 30 A. 684; Succession of Decoux, 5 A. 140; Succession of Hilligberg, 1 A. 340; Succession of Jenkins, 5 A. 638; Folse vs. Kittredge, 15 A. 222; Thompson vs. Kilcrease, 12 A. 343; Hood vs. Knox, 8 A. 78; Cobb vs. Hynes, 4 A. 150; Succession of Jordy, 5 A. 37; Girod vs. Creditors, 2 A. 548; Lacey & Butler vs. Police Jury, 28 A. 455; Verges vs. Noel, 17 A. 67; Hite vs. Barker, 17 A. 141.

(C) Formal appeal necessary when party desires amendment of judgment as to appellees.

This can not be done by mere answer to appeal.

Jamison et als. vs. Barelli, 20 A. 454; Lallande vs. McRae, 16 A. 136; Field vs. His Creditors, 11 A. 545; Succession of Egana, 18 A. 265; Converse, Kennett & Co. vs. Steamer Lucy Robinson, 15 A. 433; Porche vs. Lang et al., 16 A. 312; Noble & Kaiser vs. Steamer Powell, 20 A. 123; Moore vs. Moore, 20 A. 161.

(D) Issues on appeal:

Appellant can ask for reviewal of only that judgment or part of judgment from which he appeals.

In re Fazende & Selxas, praying for a monition, 35 A. 1147; Miller vs. Gilmore, 33 A. 1406.

889. No Subsequent Appeal by Appellee Not Answering—But if the appellee, on the appeal of the other party, neglect to pray that the judgment be reversed on those points which are prejudicial to him, he shall not afterwards be allowed to appeal, but the judgment shall remain irrevocable for or against him.

890. When Answer May Be Filed—If the appellee

neglect to answer to the appeal within the time allowed him, the appellant may have the cause set down for argument, but the appellee shall be allowed to file his answer until the day of argument, if he only prays for confirmation of the judgment with costs; but if he demand the reversal of any part, or damages against the appellant, he shall file his answer at least three days before that fixed for the argument, otherwise it shall not be received.

Answer of appellee—when filed:

1. It must be filed at least three days before argument when reversal or damages asked.

Verges vs. Noel, 17 A. 67; *Hood vs. Knox*, 8 A. 78; *Barrett vs. Donovan*, 17 A. 182; *Gay vs. Andry*, 14 L. 288; *Poydras vs. Bell*, 14 L. 391.

2. It may be filed up to day of argument when mere confirmation of judgment is asked. *Id.*

891. Answer Not Essential—But if the cause be argued without the appellee having filed his answer, and without any objection being made on that head, the judgment pronounced shall not be the less valid for such omission.

892. Hearing Proceeds Though Either Party Absent—When a cause has been fixed for argument, if the appellee or his attorney does not appear, the court shall proceed to the hearing, if the appellant require it.

So if the appellant does not appear, the appellee may argue the cause, but in either case the court shall examine the record, and render judgment for one of the parties as the nature of the proofs and the justice of the case shall seem to require.

893. New Hearing to Absentee—If, however, before the judgment becomes definitive within the time hereafter prescribed, the party who did not appear on the day fixed for the argument shall prove that he was prevented by an unavoidable accident, the court may grant him a new

hearing of the cause, and, after argument, may reverse the judgment, if there be grounds for it.

894. No Original Evidence—The Supreme Court shall receive no new evidence, even though it may have been discovered since the judgment below, except in the cases hereafter expressed.

(A) No new evidence receivable in Supreme Court except in certain cases. Hence court will not consider:

1. Affidavit or certificate of district judge that order of appeal was granted.

Phillips vs. Her Creditors, 35 A. 985; Moore vs. Simms, 21 A. 649.

Or that evidence not in transcript was offered below.

Morrison vs. Lynch, 36 A. 612.

2. Affidavit of appellee that appellant has acquiesced in judgment. When fact contested, case remanded.

New Orleans City R. R. Co. vs. Crescent City R. R. Co., 33 A. 1273; State ex rel. St. Martin vs. Police Jury, 28 A. 273; Evans & Taylor vs. Succession of Etheridge, 29 A. 576; James & Co. vs. Fellowes & Co., 23 A. 87; Nunez vs. Winston, 21 A. 666.

3. Exhibits showing that appellant corporation is defunct.

Tanneret vs. Ins. Co., 32 A. 665.

4. Affidavit that appellants were injured by illegal practices of appellee in obtaining judgment.

Keenan vs. Freret, 22 A. 31.

5. Affidavit of third person appealing to show appealable interest.

Succession of Henderson, 2 R. 391.

(B) Original evidence received when facts not disputed.

State ex rel. St. Martin vs. Police Jury, 28 A. 273; White vs. Ramsay, 14 A. 329; Campbell vs. Orillon, 8 A. 115.

895. Can Not Travel Out of Record—The Supreme Court can only exercise its jurisdiction, in so far as it shall have knowledge of the matters argued or contested below.

De non existentibus et non apparentibus eadem est ratio.

Knowledge of case comes only from the record:

1. Where record does not contain all the evidence and shows no statement of facts, note of evidence, bills of exception, special verdict, or assignment of errors, appeal dismissed.

Byrne vs. Eiddell, 2 A. 11; Mayor, etc. vs. Magee, 19 A. 261; Paterson vs. Owen, 20 A. 141; 2 How. 76; Morrison vs. Lynch, 26 A. 611; Cooley vs. Broad, 29 A. 71; Labat & Co. vs. Decuir, 33 A. 350; Jones vs. Neville, 9 R. 478; Watson vs. Jones, 16 A. 84; Barham vs. Livingston, 11 A. 604; Harris vs. Hayes, 8 A. 433; Morton vs. Owners of Steamer Chalmette, 15 A. 708; Allain vs. Preston, 6 L. 478; Nettleton vs. Stephens, 6 L. 186; Anderson vs. Stephens, 6 L. 308; Succession of Kemp, 9 A. 190; Pargoud vs. Pace, 11 A. 644.

2. Appeal in such cases dismissed *ex proprio motu* if parties do not move.

State ex rel. Wogan vs. Bank, 35 A. 564; Morton vs. Steamer Chalmette, 15 A. 708; 24 A. 20; 26 A. 746; 20 A. 141; 21 A. 453.

3. No note of evidence, bill of exception, assignment of error, statement of facts necessary when appeal is from order for executory process and certificate complete.

Bayley vs. McKnight, 18 A. 650; Louisiana State Bank vs. Cammett, 21 A. 133.

Aliter where certificate defective.

Kernion vs. Hawes, 17 A. 33.

896. When Record Incomplete—Statement of Facts—
If, therefore, the copy of the record brought up be not duly certified by the clerk of the lower court, as containing all the testimony adduced, the Supreme Court can only judge of such cause on a statement of facts, prepared and signed in the manner directed in the second section of the sixth chapter of the preceding title, or on a written exception, to the opinion of the judge, or on a special verdict, and in the absence of all these it shall reject the appeal, with costs; but this is to be understood with such modifications as are contained in the following article.

(A) Appeal not dismissed where record contains:

1. Bill of exceptions.

Taylor vs. Littlefield, 5 R. 132; Noble & Kaiser vs. Steamer Powell, 2 A. 121; Martin vs. Blanchin et al., 16 A. 83.

2. Statement of facts.

Kraentler vs. Bank of United States, 12 R. 466; State vs. Bank, 5 N. S. 840.

3. Assignment of errors.

Succession of Townsend, 86 A. 448; Beard vs. Poydras, 18 L. 83.

4. Full and complete certificate of clerk in due form.

Kearney vs. Nixon et al., 19 A. 819; Nott vs. Brander et al., 14 L. 570; Gordon vs. Gordon, 12 L. 671; Whitmore vs. Watts, 7 R. 10; Barnabe vs. Snaer, 16 A. 84; Crottes vs. Frigerio, 18 A. 283; Abbott vs. Borge, 20 A. 873; Keller vs. Judson, 18 A. 282; Morrison vs. Lynch, 86 A. 611; Reeves vs. Adams, 5 L. 288; Erwin vs. Orillion, 6 L. 205; Cammack vs. Gordon, 20 A. 218; Louisiana State Bank vs. Cammack, 21 A. 183; Bossier vs. Carradine, 18 A. 262; State vs. Giffen, 15 A. 420; In re Fazenda & Seixas, praying for a monition, 85 A. 1145; but see Harris vs. Hays, 8 A. 483; Succession of Clew, 18 A. 229; Gilloutel vs. Marcelin, 7 A. 442; Levy vs. Weber, 8 A. 439; 18 A. 288.

(B) Sufficient certificate—what is:

1. Certificate sufficient which states "that the foregoing pages do contain a true and correct transcript of all the documents filed, testimony and evidence adduced and all the proceedings had upon the trial of the suit."

Gordon vs. Gordon, 12 L. 671; Whitmore vs. Watts, 7 R. 10; Barnabe vs. Snaer, 16 A. 84; Succession of Waterer, 25 A. 210; 12 L. 476; Brown vs. Thomas, 9 A. 95; 5 L. 288.

2. Each transcript of same appeal need not contain certificate when certificate in last one refers to other transcripts, and that all together contain evidence adduced, testimony offered and proceedings had upon the trial.

Vredenburg vs. Behan et al., 82 A. 561; Washburn vs. Frank, 81 A. 427; Bouguille vs. Dede, 9 A. 292.

3. Certificate need not state that clerk compiled transcript; appellant may compile.

Washburn vs. Frank, 81 A. 427.

(C) Insufficient certificate:

1. Certificate is bad which states that "the record contains a full, true and complete transcript of all the documents filed, all the proceedings had, and all the evidence adduced on the trial as on file and of record in clerk's office."

Barham vs. Livingston, 11 A. 604; Carpenter vs. Reynolds, 8 A. 692; 6 L. 166; 6 L. 303; Vacien's Widow vs. Heirs of Payne, 12 L. 538; Pargoud vs. Pace, 11 A. 644.

2. See as to insufficient certificates:

Lanfear vs. Duralnd, 20 A. 162; Kernion vs. Hawes, 17 A. 86; Melson vs. Sandel, 21 A. 459; Watson vs. Jones, 16 A. 98; 2 A. 11; Dwight vs. Allen, 4 A. 487; Hampson vs. Reynaud, 2 A. 997; New Orleans Bank. ing Co. vs. Walker, 1 A. 180; 15 L. 282.

(D) *Appellant may require postponement of case to perfect certificate.*
Barham vs. Livingston, 11 A. 604.

(E) *Effect of complete and full certificate:*

It precludes dismissal of appeal and dispenses with necessity of—

(a) *Statement of facts.*

Louisiana State Bank vs. Cammack, 21 A. 183; Cammack vs. Gordon, 20 A. 213.

(b) *Assignment of errors.*

Bossier vs. Carradine, 18 A. 261; 14 L. 371; Keller vs. Judson, 13 A. 282; Kearney vs. Nixon, 17 A. 319; State ex rel. Gerard vs. Giffen, 15 A. 420; Warfield vs. Hamlet, 28 A. 815.

(c) *Note of evidence.* Appellate court affirms judgment on the presumption that lower court acted on proper evidence.

In re Fazende & Seixas, praying for monition, 35 A. 116; Simmons vs. Howard, 23 A. 504; Nugent vs. Stark, 34 A. 631; Heffner vs. Hesse, 26 A. 148; State vs. Monasterio, 26 A. 734; Graham vs. Rice, 23 A. 396; Farham & Blount vs. Ogle, 22 A. 73; Citizens' Bank vs. Bringier, 22 A. 118; Smith vs. City, 24 A. 28.

897. Assignment of Errors—The appellant who does not rely wholly or in part on a statement of facts, an exception to the judge's opinion, or special verdict, to sustain his appeal, but on an error of law appearing on the face of the record, shall be allowed to allege such error, if, within ten days after the record is brought up, he files in the Supreme Court a written paper, stating especially such errors as he alleges; otherwise his appeal shall be rejected.

(A) *Assignment of errors: requisites:*

1. It must refer to error of law, not of fact.

Thibodeaux vs. Winder, 39 A. 226.

But not vitiated because both kinds of error are assigned.
Henry vs. Tricou, 36 A. 519.

2. Error assigned must appear on face of record, and must be such as was not curable by proper offer of evidence.

Succession of Bailey, 26 A. 560; Flower vs. Hagan, 2 L. 225; Hill vs. Suzanne, 1 N. S. 599; 1 R. 80; 12 R. 454.

And in criminal cases at least error must have been objected to below, unless errors are gross and unambiguous.

State vs. Sheard & Smith, 35 A. 543.

8. Assignment must be filed within ten days after filing of record, otherwise too late.

Lanfear vs. Duralind, 20 A. 162; Segur vs. Hill, 4 R. 147; Ward vs. Armistead, 1 R. 460; 6 L. 209; 6 L. 187; 6 L. 144.

- (a) Assignment too late if filed after hearing, though ten days have not expired.

State ex rel. Blackman vs. Strong, 32 A. 176.

- (b) Prior filing of motion to dismiss does not neutralize effect of timely filing of assignment.

State ex rel. Blackman vs. Strong, 32 A. 176.

4. Assignment must be a written document altogether distinct from brief.

State vs. Porter & Stowe, 35 A. 1161; State vs. Arthur, 10 A. 265; State vs. Bass, 12 A. 862.

5. Assignment of errors saves appeal when record contains no note of evidence, bill of exceptions or statement of facts.

Mayer vs. Schurbrueck, 37 A. 373.

(B) When assignment of errors not necessary:

1. When record contains complete certificate of clerk.

Bossier vs. Carradine, 18 A. 261; Keller vs. Judson, 18 A. 282; Waters, Camden & Co. vs. Briscoe, 11 A. 639; Nott vs. Brander, 14 L. 370; State ex rel. Gerard vs. Giffen, 15 A. 420; Janin vs. Creditors, 10 L. 555.

2. When action of court is on exceptions which are apparent from face of proceedings.

Wood vs. Henderson, 2 A. 220; Hiestand vs. New Orleans, 14 A. 187; Walker vs. Villavaso, 26 A. 42; State vs. Balize, 33 A. 542.

898. Certiorari to Complete Record—No Dismissal of Appeal—If, at the time of argument, or before, the appellant perceives that the copy of the record is incomplete, either through mistakes or omissions, or from the clerk having failed to certify the copy as containing all the testimony produced in the cause, or from any similar irregularities not arising from any act of the appellant, the court may grant him a reasonable time to correct such errors or omissions, during which time judgment on the appeal

shall be suspended. And no appeal to the Supreme Court shall be dismissed on account of any defect, error or irregularity in the petition or order of appeal, or in the certificate of the clerk or judge, or in the citation of appeal or service thereof, or because the appeal was not made returnable at the next term of the Supreme Court, whenever it shall not appear that such defect, error or irregularity is imputable to the appellant; but in all such cases the court shall grant a reasonable time to correct such errors or irregularities (in case they are not waived by the appellee), and may impose upon the appellant such terms and conditions as, in their discretion, they may deem necessary for the attainment of justice—and may also impose such fines on the officer who shall have caused such irregularities as they may deem proportioned to the offences.

(A) Suspension of hearing of appeal to allow appellant to correct errors or omissions not imputable to him:

Application for certiorari:

When application must be made: At or before the argument generally, but in grave cases where appellant not at fault, certiorari allowed even after submission of case.

Torres vs. Falgoust, 85 A. 821; Trudeau vs. R. R. Co., 15 A. 717; Champonier vs. Washington, 2 A. 1014; Hoover vs. York, 8 A. 663.

(B) Causes which justify application:

1. Absence of important part of record:

Harvey vs. Harvey, 44 A. 82.

(a) Part of pleading—as original answer.

Smith vs. R. R. Co., 85 A. 559.

Or order of appeal.

Smith vs. R. R. Co., 84 A. 1161.

(b) Part of evidence offered and received. Evidence must figure on note and bear proper endorsement of filing.

Labatt & Co. vs. Decuir, 88 A. 851; Stafford vs. Harper, 33 A. 1373; Murray vs. Walker, 11 A. 72.

But only that branch of appeal will not be considered to which missing documents have reference.

Succession of Turnell, 84 A. 898.

- (c) Judgment appealed from, and such judgment must be signed.

Bacas vs. Smith, 89 A. 189; Succession of Haggerty, 27 A. 667; Chartier vs. Police Jury, 9 A. 42; Succession of Millaudon, 28 A. 400; Executors vs. Bird, 28 A. 262; State ex rel. Attorney General vs. Wharton, 25 A. 7; Frost vs. Fox et al., 22 A. 410 and 21 A. 261; Frantz vs. Waggaman, 28 A. 26.

- (d) Ordinance assailed for unconstitutionality.

State ex rel. Mayor, etc., vs. Judges, 88 A. 151.

(C) Who may apply for certiorari:

Appellee may bring up supplemental transcript containing his evidence left out by appellant, without his consent.

Marcy vs. Praeger, 84 A. 55.

(D) When application for certiorari to complete record should be made:

Application must be seasonable:

- (a) It is not in time after dismissal of appeal.

Bacas vs. Smith, 88 A. 141; Maritche vs. Board of Liquidation, 88 A. 588.

- (b) It seems it is not too late even after submission.

Trudeau vs. R. R. Co., 15 A. 717.

And certainly not before argument.

Bass vs. Barton, 12 L. 437.

- (c) It is too late after second motion to dismiss.

King vs. Dwight, 8 R. 1.

- (d) All grounds for dismissal waived by appellee asking for trial, or fixing of case for trial.

Golden vs. Board of School Directors, 84 A. 855; Creevy vs. Breedlove, 12 A. 745; White vs. Maguire, 16 A. 837.

(E) When certiorari will not issue:

When it is useless, as—

- (a) After missing documents have been filed, even informally.

City of Baltimore vs. Parlange, 25 A. 885; Borde vs. Erskine, 88 A. 878; Id. vs. Id., 29 A. 823; Trudeau vs. R. R. Co., 15 A. 717; Championier vs. Washington, 2 A. 1014; 15 A. 84; 16 A. 164.

- (b) When it is clear that missing document can not be found.

Noble & Kaiser vs. Steamer Powell, 21 A. 121.

(F) Waiver of irregularities:**1. Waiver of irregularities by appellee.****(a) Want of citation cured by appearance.**

Succession of Baumgarden, 35 A. 130; *Fonte vs. New Orleans*, 3 A. 72.

Or by motion to dismiss on other ground.

Lee vs. Goodrich, 21 A. 278.

(b) Failure to file transcript in time cured by answer to appeal.

Jones vs. Shreveport, 28 A. 833.

(c) Defective certificate cured by agreement "that transcript as made out is sufficient."

Huey & Wise vs. Police Jury, 33 A. 1092.

2. What is not waiver of informalities by appellee:

Act of court *ex proprio motu* setting down cause for trial.

Actus curiæ neminem gravabit.

Barham vs. Livingston, 11 A. 604; *Gwin vs. Clack*, 13 L. 68.

(G) Appeal not dismissed:**1. For defects or irregularities in—****(a) Order of appeal. Want of signature may be supplied under certiorari—no ground for dismissal.**

Austin vs. Scoovill et al., 34 A. 486; *Sate ex rel. Allen & Symen Judge*, 35 A. 1107.

(b) Citation of appeal.

See *Austin vs. Scoovill et al.*, 34 A. 486; *Hearing & Greig vs. La Co.*, 29 A. 832; *Guerin vs. Bagneries*, 9 L. 472.

Or service of such citation.

See *Borde vs. Erskine*, 29 A. 823.

(c) Fixing of return day. No ground for dismissal when judge of his own motion fixes wrong return day.

State vs. Dellwood, 33 A. 1229; *Chaffe vs. Heyner*, 31 A. 536; *Trumble vs. Brichta*, 10 A. 779; *State vs. West*, 33 A. 1261; *State ex rel. Hoey & O'Connor vs. Brown*, 29 A. 862.

(d) But appeal dismissed when wrong return day fixed by counsel, or by judge on suggestion of counsel.

State vs. Jenkins, 35 A. 865; *Wooten vs. LeBlanc*, 32 A. 683; *State ex rel. Lee vs. Jumel*, 35 A. 980; *Citizens' Bank vs. Euty*, 31 A. 747; 12 L. 480; 8 L. 220; but see *contra Chaffe & Sons vs. Heyner*, 31 A. 536.

(e) Certificate of clerk. Defective certificate no ground for dismissal when effort made to correct, for which time may be granted.

Succession of Edwards, 34 A. 217; *Thompson vs. Chapman*, 12 A. 267; *Flint & Jones vs. Peck*, 22 A. 246.

2. And appellant not prejudiced by—

- (a) Unsigned certificate, unless he fail to rule clerk to sign after notice of defect. Deputy clerk may sign.

Burton vs. Hicks, 27 A. 507; Downs vs. Tarkington, 3 A. 247; Bank of Louisiana vs. Watson, 15 L. 53; Penn vs. Evans, 28 A. 576.

- (b) Unsealed certificate.

Wood vs. Harrel, 14 A. 62; Conway vs. Irwin, 1 A. 391; Medley vs. Voris, 2 A. 140.

- (c) Except where deficiencies of certificate designedly procured by appellant.

Edson vs. McGraw, 37 A. 294.

- (d) But continued incompleteness of transcript and uncorrected certificate after motion to dismiss once made is good ground for dismissal.

Labatt & Co. vs. Decuir, 33 A. 350; Hoover vs. York, 33 A. 654; Succession of Kemp, 9 A. 190; Powell vs. Williams, 5 R. 169; Anderson vs. Stephens, 6 L. 308; Carpenter vs. Reynolds, 3 A. 592; Gilloutel vs. Marcellin, 7 A. 442; Roumage vs. Durrive, 20 A. 22; Radovich vs. Frigerio, 27 A. 68; Succession of Sanderson, 22 A. 88.

(H) *Appellant must be clear of fault:*

Act 1889, p. 170, and of 1870 E. S., p. 101, Sec. 11.

1. *Appellant is in fault and appeal dismissed:*

- (a) When defective transcript was compiled by counsel of appellant or under his supervision.

Torres vs. Falgoust, 35 A. 819; Hoover vs. York, 33 A. 653; Morrison vs. Lynch, 36 A. 611.

- (b) When his evidence is not found in record and is left out by clerk under his instruction.

Smith vs. E. R. Co., 35 A. 559; Clarke & Co. vs. Gormley, 16 A. 41; Harris vs. Hays, 9 A. 438; Baton Rouge vs. Cremonini, 35 A. 367; Charbonnet vs. Dupasseur, 27 A. 105; Hall vs. Beggs, 16 A. 130.

Except where by consent extraneous record considered part of transcript.

Bonquille vs. Dede, 9 A. 292; Ruleff vs. Nugent, 21 A. 290.

This privilege not allowed where number and title of such other record not given.

See 33 A. 63; 32 A. 668; 14 A. 67.

- (c) When improper return day suggested by him.

State ex rel. Lee & Co. vs. Jumel, 35 A. 981; Wooten vs. LeBlanc, 32 A. 692; State vs. Clinton, 27 A. 540; Bank vs. Board of Liquidation, 27 A. 542; State vs. Jenkins, 36 A. 865; State vs. Rutty, 26 A. 747; Trimble vs. Brichta, 10 A. 778.

- (d) When appellee not cited and petition for appeal contains no demand for citation.

Adams vs. Dermody, 21 A. 238; Gullbeau vs. Cormier, 21 A. 630; Gerodias vs. Handy, 31 A. 334; Bolling vs. Anderson, 14 A. 69; Walker vs. Mortolo, 16 L. 50; Gibson vs. Selby, 3 A. 313; Lobelle vs. Lobelle, 5 A. 174; Cotton vs. Sterling, 19 A. 137; Saur vs. Lefevre, 12 A. 737; Nelson vs. Beaumiller, 18 A. 700; Succession of Holmes, 18 A. 626; Schmidt vs. Benit, 17 A. 74; Succession of Treadwell, 28 A. 260; Escoubas vs. Calcasieu Sulphur Mining Co., 33 A. 494; Baird vs. Russ, 33 A. 920.

- (e) When appellee cited according to prayer as individual or in different capacity from that in which he sues or is sued.

Camutz vs. Bank, 20 A. 37; Tutorship of Osborn, 23 A. 136; 1 A. 902.

- (f) When appeal bond is fatally defective or when no bond is filed.

Green vs. Bowen, 15 A. 173; Bockel vs. Rudman, 26 A. 269; State ex rel. Rayssiguier vs. Judge, 37 A. 113; Sterling Case, 3 A. 1080.

- (g) Where transcript was not filed on return day.

St. Rimes vs. Navigation Co., 28 A. 44.

But in certain extraordinary cases appellant may be relieved.

Wright vs. Brander, 17 A. 188; Kirkland vs. Creditors, 3 N. S. 597; McDowell vs. Read, 5 A. 42; Stark, Receiver, vs. Harrod, 9 A. 21; Fish vs. Collins, 21 A. 269.

2. Appellant not in fault and appeal not dismissed:

- (a) When clerk fails to make complete transcript—that being his duty.

Edson vs. McGraw et al., 37 A. 236; Martinez vs. N. O. R. R. Co., 23 A. 28; Nicholls vs. Harris, 32 A. 646; 42 A. 331.

- (b) When appellee not cited—if petition for appeal asked citation.

Austin vs. Scovill et al., 34 A. 486; Nelson vs. Beard, 16 A. 333; Ulman vs. Briggs et al., 32 A. 655; Gallagher vs. Thomas, 23 A. 112; 13 A. 260; 14 A. 698; 10 L. 150.

And this though appellee was not named, if clerk can easily learn from record who is appellee.

Ludeling vs. Frellsen, 4 A. 534; Succession of Townsend, 3 A. 447; *contra* see Selby vs. Gibson, 3 A. 313.

- (c) When clerk neglects through any cause to make up transcript.

Kirkland vs. Creditors, 3 N. S. 597.

- (d) When appellee's evidence withheld by him is not in record.

Stafford vs. Harper, 82 A. 1076; Stockton vs. Craddock, 1 A. 40; Herriok vs. Conant, 4 A. 276; Abat & Generes vs. Harris, 16 A. 183; Marchand vs. Coyle, 18 A. 483.

But see to effect that it is appellant's duty to bring up full record or suggest diminution.

Harris vs. Hays, 8 A. 433; Levy vs. Weber, 8 A. 489; Succession of Clew, 18 A. 232.

- (e) When judge omits to fix return day.

Ohaffe vs. Hefner, 81 A. 584; Elder vs. City, 81 A. 500; Laicher vs. R. R. Co., 28 A. 520; State vs. Balize, 38 A. 542; Bank vs. Legendre et als., 85 A. 791.

Or fixes wrong return day.

Fish vs. Collins, 21 A. 289; Hoey & O'Connor vs. Brown, 29 A. 982; 89 A. 5; 10 A. 498, 778; Dellwood Case, 88 A. 1229.

But when wrong return day is suggested by appellant, appeal is lost.

Wooten vs. LeBlanc, 82 A. 692.

- (f) When clerk in preparation of transcript violates rules.

Washburn vs. Frank, 81 A. 427.

- (g) When appellee withholds important part of record.

Hagan vs. Cox, 16 A. 374.

- (h) When clerk's certificate defective by his own act.

Benham vs. Parish of Carroll, 28 A. 343; Penn vs. Evans, 28 A. 576; State ex rel. Eager, Ellerman & Co. vs. Clinton, 28 A. 52; Baltimore vs. Parlange, 26 A. 535; Thompson vs. Chapman, 7 A. 257; Smith vs. Johnson, 87 A. 677; Burton vs. Hicks, 27 A. 507.

- (i) When sheriff serves citation of appeal on attorney when service should be made on person himself either personally or at domicile.

Borde vs. Erskine, 29 A. 828; Id. vs. Id. 32 A.; Jones vs. Caperton, 14 A. 709; Sears vs. Wilson, 4 A. 525; Lewis vs. Hennen, 18 A. 280.

- (j) When appellee not cited in time or not cited at all by delay of sheriff and clerk.

Anderson vs. Irwin, 6 A. 798; Broussard vs. Broussard, 2 A. 769; Gallagher vs. Thomas, 22 A. 112.

- (k) When judge fails to fix amount of bond.

Succession of Parker, 18 A. 645.

- (l) When bond is in the exact amount fixed by the judge, even if amount be insufficient.

Hughes vs. Caruthers, 26 A. 530.

- (m) When service (or return thereon) of citation is defective.

Murphy vs. Ins. Co., 33 A. 454; Borde vs. Erskine, 33 A. 453;
Phillips vs. Creditors, 37 A. 701.

- (n) When certificate is signed by ex-clerk.

Succession of Edwards, 34 A. 216.

- (o) Where clerk's certificate is full and complete.

Grand Lodge vs. Tax Collector, 39 A. 1103.

899. Mandate to Lower Judge or Clerk—If the record be incomplete, because the judge below refused to perform any of his duties, as to sign the exceptions to his opinion, or if such imperfection proceed from a similar refusal by the clerk, the Supreme Court shall direct a mandate to such judge or clerk, ordering him to perform the duty imposed on him by law or by the nature of his office, and in the meantime it shall suspend its judgment on the appeal.

See "*Mandamus*" *ante*.

(A) *Mandamus to judge to perform duty:*

1. Of signing bills of exception when legal requirements are fulfilled.

State ex rel. Wyly vs. Judge, 35 A. 249; State ex rel. Mullen vs. Judge, 32 A. 1043; State ex rel. D'Hemecourt vs. Judge, 13 A. 434; Broussard vs. Trahan, 8 M. 714.

2. Of signing judgment.

Vascocu vs. Woodward, 35 A. 556.

(R) *Mandamus to clerk to perform duty:*

1. Of sending up complete transcript according to rules of Supreme Court.

Edson vs. McGraw, 37 A. 294; Trounstine & Co. vs. Ware & Munn, 33 A. 780.

2. But see *State ex rel. Cass vs. Clark*, 33 A. 422, where it is said only lower court has jurisdiction to compel clerk to send up transcript.

3 L. 455; 3 L. 296.

3. Supreme Court has no jurisdiction to order lower clerk to complete defective transcript when there is dispute as to facts.

Morrison vs. Lynch, 36 A. 612; 5 M. 668; 9 M. 185.

4. When clerk makes a defective transcript court will order him to make a new one at his cost.

Trounstine vs. Ware, 89 A. 779; *Edson vs. McGraw*, 87 A. 294.

900. Mandamus to Judge to Make Statement of Facts, etc.—When a party desiring to appeal from the judgment of the lower court can not obtain a statement of facts from the judge, or his signature to exceptions from his opinion, upon motion the Supreme Court shall direct a mandate ordering him to perform his duty, provided said motion be made on the first day of the term succeeding the refusal of the judge.

Mandamus lies to judge to sign statement of facts. But the application must be made on first day of succeeding term. Unlike application for order to certify record and proceedings, which is in time at argument.

Bass vs. Barton, 12 L. 439.

901. No Withdrawal of Appeal—When the Supreme Court once has jurisdiction of an appeal, whether by transmission of the record or by that of the citation served on the appellee, it can not, in any case, permit the appellant to withdraw his appeal, without the consent of the appellee, and the cause shall take its course, whether the appellant make default or not.

Withdrawal of appeal:

1. No withdrawal of appeal once lodged in Supreme Court without appellee's consent.

St. Bomes vs. Levee Steam Cotton Press Co., 81 A. 228; *Wolfe vs. Poirier*, 19 A. 108.

2. And lower court restrained by prohibition from executing the judgment.

State ex rel. Graham vs. Judge, 24 A. 598; *State ex rel. Dubuclet vs. Judge*, 24 A. 600.

3. Surety's obligation on appeal bond canceled where appeal dismissed with appellee's consent.

Tournillon vs. His Creditors, 20 A. 181.

902. Original Pleas in Supreme Court—Prescription—

Although in general parties before the Supreme Court are not allowed to plead other matters than those which were before the inferior court, nevertheless it may depart from this rule, when the exception taken is one of those which may be pleaded at any period of a cause, and the proof of it appears by the mere examination of the record.

The prescription may be pleaded before the Supreme Court when the proof of it appears on the face of the proceeding in the lower court. But the party to whom it is opposed shall have the privilege of demanding that the cause be remanded for trial upon that plea.

(A) *What pleas allowed in Supreme Court. Pleas allowed in Supreme Court for matters appearing on face of record—thus:*

1. Prescription.

La. State Bank vs. Cammack, 21 A. 184; *Nelson & Co. vs. Scott*, 21 A. 208; *Taylor vs. Hill*, 21 A. 626.

(a) It must be presented by proper plea filed, not merely raised in brief.

Chase vs. Davis, 20 A. 201.

(b) And must be filed before submission of cause.

O'Hara vs. City, 30 A. 152.

(c) And must be specific.

Gaines vs. Succession of Del Campo, 30 A. 246.

(d) Where interruption of such prescription claimed, case remanded for hearing evidence.

Dufossat vs. Laizer, 24 A. 619; *Roth vs. Hebert*, 21 A. 233; *Bernstein vs. Ricks*, 20 A. 410; *Bank of La. vs. Richard*, 8 A. 66; *Canal Co. vs. Martin*, 23 A. 211; *Suydam vs. Kinney*, 1 A. 61; *Fontenot vs. Husband*, 2 A. 780; *Bank vs. Johnson*, 1 A. 26; *Taylor vs. Woodward*, 25 A. 218; *Hoffman vs. Howell*, 21 A. 26.

(e) Prescription of note made basis of executory process must be pleaded by way of injunction in lower court; can not be pleaded in Supreme Court.

Dufossat vs. Laizer, 24 A. 618.

2. *Res judicata*.

Zollicoffer vs. Briggs, 8 R. 287; *Carpenter vs. Bently*, 12 R. 540; *Dwight vs. Simon*, 4 A. 491; *Palmer vs. Yarrowborough*, 10 L. 169; *Chev vs. Keane*, 2 L. 121.

But it seems the decision which is set up to support plea must be in the record.

See *Zollicoffer vs. Briggs*, 8 R. 287.

Quære: Does not court take judicial notice of its own judgments?

Minor vs. Stone, 1 A. 288; *Lambeth vs. Sentell*, 88 A. 698; *Carroll vs. Chaffe*, 85 A. 88.

(B) What pleas not allowed to be first made in Supreme Court:

1. Plea of discharge in bankruptcy.

Serra e Hijo vs. Hoffman, 29 A. 17.

2. Where third person appealing urges any matter not covered by the pleadings between the original parties.

McClelland vs. Maxwell, 85 A. 818.

3. Want of authorization of married woman to sue.

Cochrane vs. Miller, 10 A. 140; *Taylor vs. Littell*, 21 A. 665.

4. Affidavit of appellant showing nature and amount of claim.

Mechi vs. Lalanie, 80 A. 1186.

5. Objection to evidence, when objection was not made below.

McCloughry vs. Finney, 87 A. 27, 81; *Pannell vs. Coe*, 1 N. S. 614; *Picket vs. Bates*, 8 A. 628; *New Orleans vs. Congregation*, 15 A. 889.

6. *Lis pendens*.

Succession of Townsend, 87 A. 409.

7. Want of recordation of claim of physician and nurse in last illness.

Succession of Gollain, 81 A. 178.

8. Any demand not embraced in pleadings and not urged in lower court.

Airéy & Co. vs. Okolona Savings Institution, 83 A. 1351.

9. Any motion or plea requiring examination by Supreme Court of original evidence.

Tanneret vs. Ins. Co., 82 A. 668.

10. Objection, not urged below, to taking out injunction of judgment under same number and title.

Denegre vs. Moran, 86 A. 428.

11. New grounds for dissolution of sequestration, especially when there has been no assignment of errors.

Carter vs. Lewis, 15 A. 574.

12. Exception to right of action by plaintiff.

Cordill vs. Succession of McCullough, 20 A. 174.

(C) Requisites of valid original plea:

1. Must be filed before submission of case.

O'Hara vs. City of New Orleans, 80 A. 152.

A fortiori is plea too late after rendition of judgment and pending rehearing.

Starke vs. Burke et al., 9 A. 344.

2. Proof must appear from face of record.

Turner vs. O'Neal 24 A. 544, Succession of Taurin, 21 A. 536; Young vs. Bank, 9 A. 194; Carpenter vs. Beatty, 12 E. 540.

3. Must be filed before answer when plea is a mere dilatory exception as to capacity to sue. Answer waives exception. Montfort vs. Schmidt, 36 A. 750; Gibney vs. Fitzsimmons, 5 A. 251.

Exception as to total want of any legal right whatever to sue may be filed at any time.

See C. P. 15 and 333 *et seq.*; Brown vs. Saul, 4 N. S. 434; Union Bank vs. Dunn, 17 L. 284.

4. Must be strictly a plea and properly filed; not mere suggestion in brief.

Chase vs. Davis, 20 A. 201; Dejol vs. Johnson, 12 A. 353; York & Co. vs. Scott & Co., 28 A. 55.

903. Making Parties—When the defendant, in a case brought by appeal before the Supreme Court, dies during the continuance of the suit, his heir may be made a party in his place.

Heirs made parties after death of—

1. Appellant or appellee.

Howard vs. Yale, 27 A. 621; Louisiana Mutual Ins. Co. vs. Costa, 8 A. 1.

2. Administrator.

Anderson vs. Arnette et als., 30 A. 74.

904. Creditor Can Not Appeal—When—A creditor of a party to a suit who has not proved his debt in the lower court, can not exercise his debtor's right of appeal.

905. When Court Renders Final Judgment—When the Supreme Court reverses the judgment of an inferior court, it shall pronounce on the case the judgment which the lower court should have rendered, if it be in possession of all the facts and testimony to enable it to pronounce definitely.

Supreme Court when in possession of sufficient evidence renders that judgment which should have been rendered in lower court.

Emanuel vs. Hatcher, 19 A. 525; *Hatcher vs. Dodd*, 12 L. 148; *Chapman vs. R. R. Co.*, 21 A. 226; *Golding vs. Steamer America*, 20 A. 487.

906. When It Will Not Render Judgment—Remanding

—But if the court shall think it not possible to pronounce definitively on the cause, in the state in which it is, either because the parties have failed to adduce the necessary testimony, or because the inferior court refuse to receive it, or otherwise, it may, according to circumstances, remand the cause to the lower court, with instructions as to the testimony which it shall receive, to the end that it may decide according to law.

(A) *Remanding causes: When Supreme Court will remand:*

1. When jury was misled on material issue by erroneous charge.

Beal vs. McKiernan, 6 L. 419.

2. When an issue of fact is made in the Supreme Court, as—

(a) Fact of acquiescence in judgment by appellant.

N. O. City R. R. Co. vs. Crescent City R. R. Co., 33 A. 1275; *Evans & Taylor vs. Succession of Etheridge*, 29 A. 576; *State ex rel. St. Martin vs. Police Jury*, 23 A. 772; *James vs. Fellowes & Co.*, 23 A. 88; but see *contra White vs. Ramsey*, 14 A. 528, and particularly where parties consent that evidence may be received by Supreme Court; *Campbell vs. Orillion*, 3 A. 115.

(b) Fact of heirship of appellant.

Succession of Bailey, 24 A. 466.

(c) Fact that suit is barred by *res judicata*, plea of which is filed.

Dwight vs. Simon, 4 A. 491; *Palmer vs. Yarborough*, 10 L. 189; *Singleton vs. Smith*, 1 L. 818.

(d) Fact of cause of action being barred by prescription which is specially pleaded. But remanding allowed only where other party requests it, if prescription be apparent.

Hoffman vs. Howell & Elley, 27 A. 804; *Nicholson & Co. vs. Jennings*, 27 A. 482; *Bernstein vs. Eicks*, 20 A. 410; *Nelson & Co. vs. Scott*, 21 A. 208; *Reddy vs. Robertson*, 21 A. 191; *Both vs. Hebert*, 21 A. 238; *Canal Bank vs. Martin*, 23 A. 210; *Taylor vs. Woodward*, 25 A. 218.

3. When material testimony wanting in the record by no fault of appellant.

Nicholls vs. Harris, 32 A. 646; *Martinez vs. New Orleans*, 28 A. 28; *Meyer & Bro. vs. Dupree*, 26 A. 216; *Barrow vs. Landry*, 12 A. 38; *Lyons vs. Andrews*, 5 A. 602; *Agricultural Bank vs. Alexander*, 1 A. 246; *Enah vs. Murphy*, 11 E. 477; *Smith vs. Morrison*, 21 A. 125; *Letten vs. Spearling*, 18 A. 455; *Marchand vs. Coyle*, 18 A. 482; *Abat & Genereux vs. Harris*, 16 A. 188; *Barrow vs. Landry*, 12 A. 33; *Miller vs. Shotwell*, 3 A. 108; *Killelea vs. Barrett*, 37 A. 865; 26 A. 125, 235; 26 A. 446; 24 A. 111; 30 A. 139; 28 A. 875; 27 A. 686.

Particularly where public interests are involved.

Ice Co. vs. City, 43 A. 217.

4. When judgment by default confirmed on insufficient evidence, and clerk's certificate is complete.

Brown vs. Thomas, 9 A. 95.

No remanding for this cause where clerk's certificate is not complete.

Id., and *Johnson vs. Spearling*, 15 L. 232.

5. When in suit in opposition to executor's account clerk fails to reduce testimony to writing.

Tompkins vs. Benjamin, 16 L. 197; *Graham vs. Graham*, 16 L. 201; *Pargoud vs. Breard*, 4 A. 517; *Succession of Reeves*, 3 A. 534; *Succession of Ross*, 21 A. 511.

6. When record incomplete, clerk's certificate wanting or defective, and there is no motion to dismiss.

New Orleans vs. Lacroix, 18 A. 146; 9 L. 119; *Hagan vs. Gaunt*, 15 A. 6; *Lyons vs. Andrews*, 5 A. 602.

7. When evidence in record leaves a vital question of fact doubtful.

Barry vs. Pike, 21 A. 221; *Gleason & McManus vs. Sheriff*, 20 A. 39; *Harris vs. Bank*, 5 A. 540; *McConnell vs. Pasley*, 31 A. 532; *State ex rel. Ranger vs. New Orleans*, 34 A. 202; *State ex rel. Nelson vs. Police Jury*, 32 A. 884.

8. Where sufficient evidence to sustain injunction of seizure not in record, but admission of parties and tenor of judgment show that seizure is illegal, and new writ will issue.

Citizens' Bank vs. Cook et al., 21 A. 524; 18 A. 111.

9. When appellant from judgment taken by default was not cited.

Ellery et al. vs. Dameron et al., 18 A. 109.

10. When admissible and material evidence excluded and bill reserved.

Bordelon vs. Dumartralt, 15 A. 227; *Succession of Larendon*, 39 A. 383.

11. When judgment below was not responsive to issues made.
Wood vs. Daboval, 40 A. 257.
12. When exception is overruled cause should be remanded.
Conery et al. vs. Waterworks, 33 A. 770.
13. Where only a portion of a case is heard on appeal.
Ikerd vs. Postlewaite, 34 A. 1235.

(B) Court will not remand:

1. When all facts are before the court.
Miller, Lyon & Co. vs. Cappell, 39 A. 981; Bienvenu vs. Ins. Co., 33 A. 217; Taylor vs. Littell, 21 A. 635.
2. When appellant asks court to decide and not to remand.
This is equivalent to waiver of prejudicial errors below.
Schlater vs. Wilbert & Sons, 41 A. 406.

(C) Issues on second appeal after remanding:

Original issues are closed forever.

Boisse vs. Dickson, 32 A. 1150; Burbank vs. Harris, 30 A. 487.

907. Frivolous Appeal—Damages—The court, in confirming a judgment appealed from, shall compel the appellant to pay all the costs. It may even condemn him to pay to the appellee, if the latter claims it by his answer, such damages as it may think equivalent to the loss which he has sustained by the delay consequent on the appeal, provided the amount of such damages shall not exceed ten per cent. on the value of the amount in dispute.

(A) Damages for frivolous appeal: Damages will be allowed:

1. When appeal clearly for delay.

Bayly vs. McKnight, 23 A. 423; Pendleton vs. Eaton et al., 23 A. 485; Wiley vs. Woodman & Bement, 19 A. 210; Pumphrey vs. Prescott, 19 L. 345; Penniman vs. Richardson et als., 3 L. 101, and cases there noted; Spencer vs. Bloomfield, 20 A. 225; Uter vs. Dumontiel, 22 A. 197; Lusse vs. Miché, 22 A. 256; Carroll vs. Chaffe, 35 A. 38; City vs. Schoenhausen, 37 A. 42; 31 A. 427.

2. When appellant abandons appeal, however meritorious, which appellee brings up.
Hohl vs. Meyer, 7 A. 18.

(B) Damages will not be allowed:

1. When appeal is not frivolous, as when appellant's error honest.
Thomas vs. Gullbeau, 35 A. 929.

And where in executory process larger percentage as attorney's fees is allowed than was agreed upon.

Insurance Co. *vs.* Lozano, 89 A. 321.

2. When appellee asks amendment of judgment.

Mahan *vs.* Michel, 27 A. 96; Deblieux *vs.* Darbonneaux, 1 N. S. 217; Hood *vs.* Knox, 8 A. 78; Gorham *vs.* Hayden, 6 R. 460; Whetstone *vs.* Rawlins, 26 A. 476.

3. When evidence is conflicting and only questions of fact are involved.

Austin & McWilliams *vs.* Moore, 16 A. 218.

4. When appeal dismissed for want of jurisdiction.

Munday *vs.* Lyons et al., 85 A. 900.

5. When appeal is taken by administrator from order commanding him to render account.

Girouard *vs.* Broussard, 28 A. 626.

6. When motion to dismiss for want of jurisdiction is made.

Thomas *vs.* Guilbeau, 85 A. 929; Allen *vs.* Arnoull, 18 L. 437; McLeod *vs.* Simonton, 89 A. 858.

And damages can not be awarded or inquired into on mere motion to dismiss.

Reiners *vs.* St. Ceran, 27 A. 112.

7. When appeal is only devolutive and appellee not delayed in execution of his judgment.

Chaffe, Jr. *vs.* Carroll, 85 A. 115; Crofts *vs.* Moynihan et al., 24 A. 27; 18 A. 286; 18 L. 81.

8. When judgment appealed from is not money judgment.

Arrowsmith *vs.* Rappelge et al., 19 A. 528.

9. When judgment is not confirmed but appeal dismissed *ex proprio motu*.

Henderson *vs.* Montgomery, 18 A. 211.

10. When damages not claimed in appellee's answer.

Cockburn *vs.* Groves & Co., 17 A. 18; Pecoul *vs.* DeMahy, 17 A. 18; Siegel *vs.* Drumm, 21 A. 8; 8 A. 73.

(C) Amount of damages:

1. Five per cent. interest on appeal from fiat in executory process when claim bears eight per cent. interest.

Lamothe *vs.* Lamarque, 17 A. 77.

2. Eight per cent. interest when note and judgment carry that rate. No interest added on appeal.

Saloy *vs.* Gubernator, 17 A. 169.

908. Costs of Appeal—If the judgment be reversed, in whatever degree it may be, the appellee shall pay the costs.

See *In re Fazende & Seixas* praying for monition, 85 A. 1147.

Brief printing is not item of cost taxable against party cast.

Cline vs. R. R. Co., 42 A. 86.

909. Reasons for Judgment—The Supreme Court shall state the reasons of its judgments, by citing, as exactly as possible, the laws on which it founds its opinion. When the judges are all of the same opinion, it shall be sufficient that one of the number pronounce the judgment; but if there be a division between them, they shall declare their opinions separately.

910. Recordation of Judgments—All the judgments or orders rendered by the Supreme Court shall be recorded at length by the clerk, in records kept for that purpose.

911. Judgment—Finality—Rehearing—The judgments rendered by the Supreme Court at *New Orleans* shall be final, and the clerk shall deliver a copy to every person requiring it, after six judicial days shall have elapsed from the rendering of the judgment, and that the parties shall have a right, at any time within said delay, to apply for a rehearing according to existing laws.

(A) Finality of judgments:

1. All judgments of Supreme Court at New Orleans are final only after lapse of six judicial days from rendition. This applies to judgments granting remedial writs, *e. g.*:

(a) Certiorari.

Regan vs. Washburn, 39 A. 1071.

But certiorari operating as habeas corpus is final immediately on rendition of judgment.

State ex rel. DeBuys vs. Judges, 82 A. 1264.

(b) Mandamus.

State ex rel. Newman vs. Judge, 22 A. 210; State ex rel. Samuel vs. Jumel, Man. Unreported Cases, 243; overruling State v. Judge, 18 A. 112.

(c) Prohibition.

State ex rel. Gerson vs. Richardson, Judge, 27 A. 261; State ex rel. Gausson vs. Judge, 21 A. 50.

(B) Finality of judgments rendered at country terms.

1. Act 18 of 1879, p. 38, amends Art. C. P. 911, so as to read as follows: "The judgments rendered by the Supreme Court at New Orleans shall be final after six judicial days shall have elapsed from the rendering of the judgment, and those rendered by the Supreme Court at other points where the court may be holden shall be final after three judicial days shall have elapsed from the rendering of the judgment. The parties shall have the right at any time within said delays fixed to apply for a rehearing according to existing laws. The clerk shall deliver a copy of any final judgment to every person requiring it."

2. Independent of this act, the court decided that three days' delay was necessary before judgments at country terms should be final.

State ex rel. Fairchild vs. Stillman, 21 A. 162.

912. Rehearing—In the interval between the day on which the judgment is rendered and that on which it becomes final, a party dissatisfied with the judgment may apply to the court for a new hearing in the cause, and for this purpose shall present a petition, in which he shall state substantially the reasons for which he thinks the judgment erroneous, and shall cite the authorities in support of his opinion.

(A) Rehearing:

1. Application need not be filed in open court.

State ex rel. Fairchild vs. Stillman, 21 A. 162.

2. Application for rehearing timely if filed on last judicial day, though court had previously adjourned sine die on that day.

Fairchild vs. Stillman, 21 A. 162.

3. Application must be couched in respectful language, otherwise will be stricken from the records of clerk.

State vs. Soule, 8 R. 500.

(B) *No rehearing granted:*

1. When judgment is not final, as—

(a) *Refusal of motion to dismiss.*

Succession of Edwards, 34 A. 220; Golden vs. Board of School Directors, 34 A. 355; State ex rel. Gerson vs. Judge, 37 A. 262; State ex rel. Leche vs. Fowler, 42 A. 147; Burney vs. Ludeling, 41 A. 627.

(b) *Aliter when motion prevails.*

Id.; Renshaw vs. Stafford, 34 A. 1140; Katz & Barnett vs. Sorsby, 34 A. 590; Coyle vs. Succession of Creevy, 34 A. 540; Hutchinson vs. Richardson, 19 A. 183.

2. When it is based on supplemental transcript brought up on clerk's certificate of inadvertent omission of documents.

Maritche vs. Board of Liquidation, 33 A. 583.

3. When petition for rehearing solely raises points not raised on the trial.

Auchincloss vs. Frois & Co., 24 A. 32; Succession of Broem, 14 A. 67; Petitpain vs. Palmer, 1 R. 721.

But court will in proper cases make exception to this rule.

Schreiber vs. Board of Assessors, 37 A. 912.

2. When application for rehearing emanates merely from *amicus curiæ*, not a party, and is not acted on by the court.

Lesassier & Binder vs. Board of Liquidation, 30 A. 617; Life Association of America vs. Hall, 33 A. 67.

5. When application itself does not set forth reasons and authorities, and not accompanied by statement of points.

LaCroix vs. Camors & St. Gez, 34 A. 639-642; Brown vs. Stroud, 34 A. 374; Lafayette Ins. Co. vs. Remmers, 30 A. 1347.

6. When application not accompanied by printed statement of points, and no time asked. Rule IX of Supreme Court Rules.

Succession of Tabary, 30 A. 190; Lafayette Fire Ins. Co. vs. Remmers, 30 A. 1349; Brown vs. Stroud, 34 A. 379-380.

7. When not necessary, as where judgment can be changed without rehearing.

Succession of Markey, 22 A. 265; Ins. Co. vs. Lozano, 39 A. 321.

8. Where one rehearing has already been had.

State ex rel. Wentz vs. Wilson, 37 A. 727.

But where on rehearing appeal is dismissed by manifest error court will reinstate the appeal on having error called to its attention.

Flash, Lewis & Co. vs. Schwabacher, 52 A. 356.

913. Rehearing—Argument—Finality of Judgment—

The court shall consider of the reasons adduced in such petition, without argument, and if it grants a new hearing of the cause, shall state the points on which it wishes to hear the parties anew.

While the court is deliberating on this application, the three days allowed for rendering a judgment final do not run.

914. Refusing Rehearing—If the court refuses a new hearing, it shall declare its opinion, without being obliged to state the reasons for it.

915. Judgment—Execution—No execution shall issue on the judgments of the Supreme Court, but such judgments, whether confirming or reversing those appealed from, shall be sent back for their execution to the inferior court, and no mandate need be directed to the latter for that purpose.

Lower court must execute judgment of Supreme Court, and when mode of execution is prescribed in the judgment, lower court can not inquire into its legality.

Heirs of Stafford vs. Renshaw, 83 A. 443; *State ex rel. Boye vs. Judge*, 18 A. 108.

916. Judges—Precedence—Precedence shall be determined among the judges of the Supreme Court by the date of their commissions, and if their commissions are of the same date, the oldest individual shall take precedence.

Aliter under Art. 82 of Constitution of 1879, and all Constitutions since 1880.

917. Orders to Public Officers or Individuals—The Supreme Court may, when required by one of the parties, direct orders to public officers or individuals to produce before it any title deeds, papers or documents relating to

suits which are in their possession, or of which they are depositaries, when the said documents may be necessary to the decision of a cause pending before it.

Pargoud vs. Richardson, 80 A. 1286.

918. Limitation on This Power—But the Supreme Court can only exercise this power with regard to the documents belonging to a public office, when such office is kept in the place where it holds its sittings, otherwise the parties must produce properly certified copies of the papers belonging to such suits, which have been adduced in the lower court.

This rule shall be common to all the tribunals of the State.

District courts have power to order clerks to obtain from records in other courts in the parish documents or papers necessary in a suit.

Act 48 of E. S. 1870.

919. Production of Document—Receipt by Clerk—Whenever any title deed or document relating to a suit shall be produced by a public officer, or other individual, by order of the Supreme Court, it shall be delivered to the clerk of the court, who shall give a receipt for it, and when the cause is determined, it shall be the duty of the clerk to return such document to the public officer or other individual from whom he received it, and not to retain it under any pretext.

920. Sheriffs Attend Sittings—Compensation—It is the duty of the sheriffs of the different parishes where the Supreme Court is in session to attend its sittings, or to send one of their deputies; and a compensation is granted to such sheriffs of two dollars for each day they or their deputies shall be thus employed, which sum shall be paid to them out of the treasury of the State, on the warrant of one of the judges of the Supreme Court.

TITLE III.

OF THE PROCEEDINGS IN COURTS OF PROBATE.

CHAPTER I.

OF COURTS OF PROBATE AND THEIR JURISDICTION.

921. Probate Courts—Courts of probate are especially established for the opening and settling of all successions, and for the trial of probate causes and the disposition of such probate business as require to be done in open court.

(A) District courts:

District courts have probate jurisdiction under Constitution of 1879. Art. 109 reads: "District courts shall have original jurisdiction in all civil matters when the amount in dispute shall exceed fifty dollars, exclusive of interest. They shall have unlimited original jurisdiction in all criminal, probate and succession matters, and when a succession is a party defendant."

(B) Federal courts:

Federal courts have no probate jurisdiction.

Gaines vs. Fuentes, 2 Otto, 18; Succession of Burnside, 34 A. 73.

(C) Powers of district courts as courts of probate:

District court in which succession is opened necessarily has jurisdiction—

1. Of all contests over tableaux of distribution irrespective of amounts involved.

Hebert, Tutor, vs. Winn, 22 A. 109; Hart, Tutor, vs. Hoss & Elder, 2 A. 517; Succession of Prudhomme, 23 A. 229; Succession of Binger, 2 A. 101; Swan vs. Gayle, 21 A. 480; Hereford vs. Babin, 14 A. 332.

2. And also of claim for marital portion where there are no heirs.

Succession of Leppleman, 30 A. 468; Succession of Callie Newman, 2 A. 593; Champin vs. Bakewell, 21 A. 354.

Heirs must be sued where there are any.

Vassar vs. Dupre, 8 A. 493.

3. Of recognition of heirs and establishment of their rights to succession.

Succession of Romignac, 21 A. 364; Hart, Tutor, vs. Hoss & Elder, 22 A. 517; Malone vs. Casey et als., 25 A. 466.

4. Of probating a will.

Hebert, Tutor, vs. Winn, 22 A. 109; Succession of Labranche, 23 A. 292.

5. Of annulling wills and setting aside of probate of same.

Succession of Hoover vs. York & Hoover, 30 A. 753; Gaines vs. Chew, 2 How. 640.

6. Of partition of succession property.

Malone vs. Casey, 25 A. 466.

Aliter where succession is closed, or heirs are in full possession.

Johnson vs. Labatt, 25 A. 148; Gillespie vs. Twitchell et als., 34 A. 288; Gage vs. Price, 30 A. 93; Boutte vs. Boutte, 30 A. 177; Buddecke vs. Buddecke, 31 A. 572; Sevier vs. Succession of Gordon, 23 A. 212.

7. Of settlement of tutorship.

Salvant vs. Salvant, 24 A. 816

8. Of interpreting a will.

Denegre vs. Denegre, 33 A. 692.

9. Of claims by creditors, executors, legatees, heirs against succession.

Stafford vs. Harper, 32 A. 1080; Lauve vs. Van Horn, 25 A. 446; Succession of Haggerty, 28 A. 87; Boutte vs. Boutte, 30 A. 181.

(F) *Probate orders in chambers:*

District judges may grant certain probate orders at chambers.

Act 15 of 1882 reads: "To empower district judges to grant at chambers certain orders in probate matters.

"Section 1. That district judges shall have authority to grant, at chambers, orders for affixing seals, taking inventories and making partitions; to order the execution of wills; to confirm testamentary executors, to confirm and appoint tutors and under-tutors; to appoint dative testamentary executors, administrators, curators of vacant successions, and attorneys for absent heirs; to order family meetings and homologate their proceedings, if no opposition be made thereto; to grant orders for the sale of succession property, and generally all orders relating to the settlement of successions and the administration of tutors."

922-924 COURTS OF PROBATE AND THEIR JURISDICTION.

(E) *Probate orders by clerks.*

Clerks have power to make certain probate orders.

See C. P. 744 and notes, Act 75 of 1884.

922. Why Named Courts of Probate—They are called courts of probate because the proving and recording of last wills and testaments are made before them.

923. Parish Judges—The parish judges are *ex-officio* judges of the courts of probate in their respective parishes.

(*Inoperative.*)

924. Probate Powers—Courts of probate have the exclusive power:

1. Probate of Wills—To open and receive the proof of last wills and testaments, and to order the execution and recording them.

2. Appoint Tutors, Curators, etc.—To appoint tutors and curators for minors, interdicted and absent persons who have no representatives in the State, and for such persons as are not capable of administering their own property.

3. To Confirm Testamentary Nomination of Tutor—To confirm or reject such tutors of minors as may have been appointed by the last will of their father or mother.

4. To Appoint Curators—To appoint curators to vacant estates and absent heirs.

5. To Order Inventories and Sales—To grant orders to make the inventories and sale of the property of successions, which are administered by curators, or testamentary executors, or in which the heir prays for the benefit of inventory.

6. To Confirm Nomination of Testamentary Executors and Issue Letters—To homologate wills in which one or more testamentary executors are appointed, and to issue letters of administration to such executors.

7. To Appoint Dative Testamentary Executors—To appoint one or more dative testamentary executors, when the executor appointed by the testator will not, or can not, perform the duties, or is dead or absent.

8. To Remove Tutors, Curators, etc.—To remove or supply the places of such tutors, curators and testamentary executors, in the cases provided by law.

9. To Compel Administrators to Account—To compel such administrators to render an account, when required, or at the period fixed by law.

10. To Interdict the Insane—To interdict persons who fall into a state of madness, and to restore them to the enjoyment of their rights when they regain their reason.

11. To Compel Heirs to Accept or Reject Succession—To compel such heirs as have taken time to deliberate to declare, when required by the creditors of deceased, whether they accept or renounce a succession.

12. To Put Heirs in Provisional Possession—To decide on the putting in provisional possession of the heirs of absentees.

13. To Pass Upon Claims Against Successions and Homologate Accounts—To decide on claims for money which are brought against successions administered by curators, testamentary executors, or administrators of successions, and to establish the order of privileges and mode of payment; provided that their jurisdiction in suits, in which a succession is either plaintiff or defendant, shall not exceed five hundred dollars.

14. To Partition Successions Among Heirs—To obtain and regulate all partitions of successions in which minors, interdicted or absent persons are interested, or even those which are made by authority of law, between persons of lawful age and residing in the State, when such persons do not agree upon the partition and mode of making it.

C. P. 164, 331, 363, 366, 396, 1022.

925. No Jurisdiction—When—The courts of probate shall have no jurisdiction, except in the cases enumerated in the preceding article, or in those which shall be mentioned in the remaining part of this title, or in those specified and determined by law.

CHAPTER II.

OF THE MODE OF PROCEEDING IN COURTS OF PROBATE.

926. Summary and Ordinary Process—Courts of probate have two modes of proceeding; the one by summary, and the other by the ordinary process.

927. Rules—The rules relative to proceedings in courts of probate differ according to the various matters of which they have cognizance, and of which we shall treat in the following sections:

SECTION I.

Of the Mode of Proceeding in Certain Actions.

§ 1.

Of the Opening and Proving of Wills.

928. Proving Wills—When a testator is dead, his testamentary executor or any other person who may feel an interest in having his will executed, shall present a petition for that purpose to the judge of probate of the place where the succession is open.

929. Successions—Where Opened—The place in which a succession is opened, is, and in future shall be held to be, as follows, notwithstanding any former law to the contrary:

In the parish where the deceased resided, if he had a domicile or fixed place of residence in the State;

In the parish where he left landed property, if he had neither domicile nor place of residence in the State; or in the parish in which it appears from the inventory that his principal property was situated, if he had property in several parishes;

In the parish where he died, if he had no certain domicile nor any fixed property.

(A) *Where succession shall be opened:*

1. It must be opened in the parish where the deceased resided, if he had a domicile or fixed place of residence in the State.

Verret vs. Bonvillain, 83 A. 1305; *Succession of Carney*, 15 A. 699; *Clemens, Guardian, vs. Comfort*, 26 A. 269; *Succession of Williamson*, 8 A. 261; *Miltenerberger vs. Knox*, 21 A. 899.

(a) Domicile is the fact of residence coupled with the will of making permanent establishment. It is *factum manendi cum animo, et animus manendi cum facto*.

Gravillon vs. Richards, 18 L. 297; *Evans & Husband vs. Payne & Harrison*, 80 A. 498; *Grivot vs. State Bank*, 81 A. 467.

(b) Question of domicile determined in default of declaration before parish recorder (C. C. 42) by all attending circumstances.

Id.

2. It must be opened in the parish where decedent left landed property, if he had neither domicile nor place of residence in the State; or in the parish in which it appears from the inventory that his principal property was situated, if he had property in several parishes.

Succession of Linton, 27 A. 851.

(B) *Proceedings null—when:*

All proceedings had or judgments rendered except where succession properly opened are absolute nullities.

Miltenerberger vs. Knox, 21 A. 899; *Succession of Williamson*, 8 A. 261.

(C) *Louisiana property belonging to foreign succession, how regarded:*

Property of deceased situated in Louisiana is a separate succession from that in other State or country, and must be administered according to the laws of Louisiana.

Succession of Romignac, 21 A. 865; 14 A. 638; 9 R. 498; 1 R. 263.

930. Copy of Will—Execution and Recordation—If the will be made by a public act, it shall be sufficient for the petitioner to annex a copy of it in due form to his petition, and to pray for the execution and recording of it.

Opening and proving of wills:

1. Will and order of execution may be attacked either directly or indirectly. It is not *res judicata*.

Succession of Lampton, 35 A. 419; Dalton vs. Wickliffe, 35 A. 336; Sophie vs. Duplessis, 2 A. 724; Duplessis' Succession, 10 E. 198; Abston vs. Abston, 15 A. 187; Fuentes vs. Gaines, 25 A. 86; Succession of Dupuy, 4 A. 570; Fox vs. McDonogh's Succession, 18 A. 444; 10 A. 78.

2. Unprobated will produces no effect.

Lucas vs. Brooks, 23 A. 123; Aubert vs. Aubert, 6 A. 105; State ex rel. Remendo vs. Judge, 17 A. 189.

931. Letters Testamentary—If it be the executor appointed by the will who presents the petition, he shall demand not only the execution and registry of the will, but that letters testamentary be delivered to him, if he agrees to accept the appointment; and if he fail to pray for such letters testamentary, he shall be presumed to have declined the trust.

C. P. 924.

932. Proof of Death—The judge shall only order the execution and registry of the will when satisfied that the testator is actually dead.

933. Order to Prove Will—When the will has been made in the presence of witnesses, the judge, after being satisfied of the testator's death, shall order that the will be proved before him on a day, place, and hour, to be fixed by him, by the number of witnesses required for that purpose by law.

Witnesses:

Person who acted as amanuensis of the testator for that purpose is not disqualified thereby from officiating as one of the witnesses to the will.

Wood vs. Roane, 35 A. 865.

934. Opening Sealed Packet—If the will be contained in a sealed packet, the judge shall order the opening of it at the time appointed by him, and shall then proceed to the proof of the will.

935. Witness—Heirs, Notice to—The party praying for the opening and proof of the will, shall cause to be summoned the number of witnesses possessing the qualities required for such proof, and if the presumptive heirs of the deceased or any of them reside in the place, he shall give them notice in writing, that they may attend, if they think proper, at the opening and proof of the will.

C. P. 942.

Notice of probate:

State is not an heir and is not entitled to notice of probating of will.

State vs. Ames, 23 A. 69.

936. Order on Notary or Other Person to Produce Will—If the petitioner alleges under oath in his petition that he is informed that the will of the deceased, the opening of which and its proof and execution are prayed for, is deposited in the hands of a notary or any other person, the judge shall issue an order to such notary or other person, directing him to produce the will or the packet containing it, at a certain time to be mentioned, that it may be opened and proved, or that the execution of it may be ordered.

C. P. 189, 473.

937. Enforcement of Order—If the notary or other individual to whom the said order is directed refuses to obey it, the judge shall issue an order to arrest him, and, if he does not adduce good reasons for not producing the will, shall commit him to prison until he produces it, and he shall be answerable in damages to such persons as may suffer from his refusal.

938. Proof of Will—At the time appointed for opening and proving the will the judge shall proceed in this duty in the manner prescribed by law.

939. Witnesses—Depositions—For the purpose of such proof, the judge shall receive the deposition, in writing, of each of the witnesses produced, which depositions shall be signed by them with their names or ordinary marks, and the whole shall remain annexed to the record.

940. Reading Will—Order of Execution—After this proof the judge shall read the will in an audible and distinct voice, to the end that its provisions may be heard by the witnesses and all other persons present, and if it appear to be in regular form the execution of it shall be ordered, and it shall be recorded.

941. Original Will Deposited—The judge shall also ordain that the original of the will thus proved shall be deposited in his office, after being signed *ne varietur*, by him, at the beginning and end of each page.

Deposit of original will.

This can not be done sometimes, as where will is executed and proved in foreign country where original can not, by law, be removed.

Succession of Robert, 2 R. 427.

942. Proces Verbal—Contents—The judge before whom a will shall be thus opened and proved, shall prepare a proces verbal, in which he shall recite,

1. **Opening and Proof of Will**—The manner in which the opening and proof were made;

2. **Names of Witnesses**—The names and surnames of the witnesses and the manner in which they made their declarations;

3. **Reading Will**—The reading the will in an audible

and distinct voice to the witnesses and other persons present;

4. Order for Execution and Recording Will—Signature of Judge or Clerk—The order for executing and recording the will and for depositing it, after having signed it *ne varietur*, at the beginning, and end of each page.

This proces verbal shall be dated and signed by the judge or clerk, and shall remain annexed to the record as a part of it.

943. Depositions of Witnesses—When a will has been thus proved, the depositions of witnesses taken in writing shall be considered good evidence, in case the will be subsequently attacked, although such witness be dead or removed permanently from the State.

C. P. 935, 941.

Collateral attack on decree:

Probate and order of execution of will may be attacked collaterally by any one in interest.

For *vs. McDonogh's Succession*, 18 A. 444; *Sophie vs. Duplessis*, 2 A. 724; *Aubert vs. Aubert*, 6 A. 104; *Fuentes vs. Gaines*, 25 A. 86; *Arston vs. Arston*, 15 A. 137; *Succession of Duplessis*, 10 R. 198; 10 A. 78.

§ 2.

Of the Appointment of Tutors and Curators of Minors, Interdicted and Absent Persons.

944. Tutors and Curators—The appointment of a tutor or curator to a minor belongs to the judge of probate of the place of domicile or usual residence of the father and mother of such minor, if they or either of them be living.

(A) What judge appoints tutor:

1. Where father or mother are living, judge of place of their domicile appoints tutor.

Succession of Winn, 8 R. 303; *Succession of Bronson*, 11 A. 24; *State ex rel. Boissac vs. Recorder*, 14 A.

2. And also of under-tutor.

State vs. Bermudez, 2 R. 418; 14 L. 484.

3. He has also power to order family meeting.

State vs. Bermudez, 2 R. 160.

(B) Responsibility of tutor:

He is responsible to minor whether he take oath or give bond or not.

Colomb vs. Jones, 8 A. 448; *Chamberlain vs. Chamberlain*, 12 A. 60;
Gousoulin vs. Miguez, 5 A. 565; *Way vs. Levy*, 41 A.

(C) When tutor administers estate: his liability.

He is not liable as tutor until final account is rendered.

Goux vs. Moncia, 30 A. 745

945. What Judge Appoints—If the father and mother of the minor be dead, the appointment shall be made by the judge of probate of their last place of domicile, or if they had no domicile of that of the minor's nearest relations.

C. P. 116.

What judge appoints when father and mother are dead:

Appointment of tutor must be by judge of last place of domicile of father and mother if they be dead.

Succession of Garrison, 15 A. 28; 13 A. 265; *Succession of Stephens*, 19 A. 501.

946. What Judge Appoints—When—If the father and mother of the minor reside out of the State, and are not represented in it, and the minor be also absent, he may be provided with a tutor or curator by the judge of probate of the place where he has interests to assert or defend.

C. P. 108, 116, 969, 968.

1. Who may be dative tutor without bond:

No person but a resident of the parish can be appointed by the judge dative tutor without bond.

Succession of Foley, 84 A. 129.

2. Natural tutors may be non-residents.

Robbins vs. Wells, 5 N. S. 379; *Succession of Guillemain*, 2 A. 684; *Dela-croix vs. Boisblanc*, 4 M. 717; *Bailey vs. Morrison*, 4 A. 534.

3. Right to tutorship by surviving parent not divested by will of grandfather naming grandchildren universal legatees.

Hoggatt vs. Morancy, 10 A. 189; Succession of Foucher, 80 A. 1017; Succession of Forstall, 25 A. 480.

4. Person adopting can not exclude father from tutorship.

Tutorship of Upton, 16 A. 175.

947. Information—Duty to Give—All persons, even strangers, ought to give information to the judge, within whose province it lies, of the fact which gives rise to the appointment of a tutor.

948. Judge—Duty of—It is the duty of the competent judge to whom this information is given, or to whom a petition is presented for appointing a tutor or curator to a minor, to make the appointment in the manner hereafter provided.

949. Father as Tutor—Emancipation—If it be the father of the minor who presents the petition claiming his tutorship, the judge shall confer it on him, only requiring of him an oath to perform the duties well and faithfully; provided, that said minors may, in certain cases determined by law, be dispensed from the time prescribed for attaining the age of majority.

(A) Dative tutorship:

1. Mother remarrying without convening family meeting to continue her in tutorship forfeits it, and can not be appointed dative tutrix unless a resident of parish.

Succession of Foley, 84 A. 129; Succession of Peck, 9 A. 306; Minors Bossy, 3 R. 893; Webb vs. Webb, 5 A. 593.

2. And until appointed dative tutrix she does not represent minors.

Heroman vs. Institute of Deaf and Dumb, 84 A. 810; Grant vs. Maler & Moore, 32 A. 51; Keene vs. Guier and Sheriff, 27 A. 232.

3. Curator *ad hoc* should be appointed in meantime.

Keenan vs. Ahern, 84 A. 895.

(B) Provisional tutor :**Provisional tutor unknown.***Fisk vs. Fisk*, 2 A. 71.**(C) Actual appointment necessary :****Father must be appointed by judge ; mere application unacted on confers no authority.***Fisk vs. Fisk*, 2 A. 71; *Tutorship of Hughes*, 13 A. 390; *Berichaux' Case*, 7 L. 539; but see *Stilley vs. Stilley*, 20 A. 64, where confirmation of appointment of natural tutor said to be unnecessary, though he must take oath; also 11 R. 503; 12 R. 636; 3 A. 562.**(D) Dative tutor not appointed—when :****When there is any natural or testamentary tutor.***Tutorship of Labarre*, 5 R. 268.

950. Mother as Tutrix—Appointment—Oath—If the father of the minor be dead, and his mother claim the tutorship, the judge shall confer it on her, if she has not entered into a second marriage, only requiring from her the same oath as in the foregoing article.

951. When Mother Remarries—But if the minor be the child of a first marriage, and the mother has contracted a second, the judge shall not confer the tutorship on her, during the life of her second husband, except by the advice of a family meeting duly convoked for that purpose.

Mother dative tutrix—when :

1. Mother continued in tutorship by advice of family meeting is dative tutrix, not natural tutrix.

Succession of Foley, 34 A. 129; *Tutorship of Bossy*, 3 R. 390.

2. Mother not continued in tutorship after remarriage can not name testamentary tutor.

Succession of Walker, 32 A. 321.

952. Ascending Relations—Order of Preference—If it be one of the ascending relations of the minor who claims the tutorship, and the minor has several ascending relations in the same degree, the judge shall, on a petition presented to him for the purpose, direct that the other ascending re-

lations in the same degree be summoned to show cause, if they have any, why the appointment prayed for shall not be made.

(A) What women can not be appointed tutrix:

Of women, only mother and grandmother are eligible.

Auguste vs. Trudeau, 2 A. 623.

(B) Hence are excluded:

1. Great-grandmother.

Auguste vs. Trudeau, 2 A. 623.

2. Stepmother.

Succession of Swayze, 13 A. 244.

(C) But woman, otherwise excluded, may be given raising and management of child, while some one else is appointed tutor.

Succession of Payne, 25 A. 206.

(D) By Act 45 of 1894 women may be appointed to tutorship in certain cases.

953. Collateral Relations—If it be a relation not in the ascending line who claims the tutorship, the judge shall order the petitioner to declare under oath what are the minor's relations residing in the State, who are in an equal or nearer degree than he is, and on such declaration he shall order that such relatives be cited, to show whether they have any cause for opposing the appointment prayed for.

(A) Displacement of tutor:

Tutor regularly appointed will not be displaced for one who would have had better right to appointment if he had been resident of State at time of appointment.

Succession of Brownson, 11 A. 24; Succession of Nicholson, 5 A. 359;
Percy vs. Provan, 15 L. 74.

(B) No collateral attack on appointment:

Appointment of tutor or under-tutor can not be collaterally attacked.

Succession of Hawkins, 35 A. 591; Lalanne's Heirs vs. Moreau, 13 L. 481; Thibodaux vs. Thibodaux, 5 A. 598.

954. Opposition to Appointment—If there be conflicting claims between the ascending and other relatives, and one of them shall pretend a better right than the person claiming the tutorship, he shall file his written opposition to the appointment, in the office of the judge, before the day on which such an appointment is to be made, stating substantially his reasons for the opposition,

Who can not oppose:

Under-tutor who, though cited, fails to attend family meeting, can not oppose.

Osborn vs. Rogers, 23 A. 167.

955. Summary Trial—The judge shall determine in a summary way on such opposition, and shall confer the tutorship on the person whom he thinks to have the best right; but the other party may appeal from his decision, as hereafter provided.

C. P. 590, 876, 1084, 1049.

Judge will not be mandamusd to appoint particular person as tutor. Remedy is by appeal.

State ex rel. Hirsch vs. Judge, 33 A. 368.

956. Tutor by Will—Confirmation—If the father or mother of the minor have appointed a tutor for him by will, the tutor thus appointed shall present a petition to the judge of probate, to which a copy of the will must be annexed, praying to be confirmed in his tutorship.

(A) *Who may not appoint tutor by will:*

Mother, not continued in tutorship after remarriage.

Succession of Walker, 52 A. 521.

(B) *What will be considered an appointment by will:*

Wish of a person that a party should have entire charge of children.

Succession of Fuqua, 27 A. 273.

957. Tutor—Family Meeting—When—If no relation of the minor claim the tutorship or will accept the same, the

judge may appoint, with the advice of a meeting of the minor's relations, or friends if he have no relations, some discreet and responsible person to be tutor, and another to be under-tutor, who shall in all respects comply with existing laws in relation to tutors, except that of giving security.

C. P. 108, 109.

Family meeting to advise as to tutor or tutrix:

1. When necessary or advisable.

(a) When a divorce is rendered, and it is desired to have unsuccessful party tutrix or tutor.

Cailleteau vs. Ingouf, 14 A. 624.

(b) When mother remarries. If not continued in the tutorship by family meeting, it is forfeited.

Hall vs. Parks, 9 R. 88; *Grant vs. Maler*, 52 A. 51; 25 A. 54; *Webb vs. Webb*, 5 A. 596; 8 R. 390; 4 A. 428.

(c) When claimants to tutorship are ascendants in direct line and same degree.

Wood vs. Brown, 10 L. 541; *Boyer vs. Tassin*, 9 A. 491.

2. When not necessary or advisable.

When mother is appointed natural tutrix.

Mollinari vs. Fernandez, 2 A. 567.

958. No Curator Ad Bona or Ad Litem—There shall hereafter be no curator *ad bona* or curator *ad litem* appointed in any case; the persons and estates of minors shall in all cases be placed under the power of tutors and under-tutors; and the powers, duties and responsibilities of tutors and under-tutors, as well as their liability to be removed from office, shall continue until the minor or minors attain the age of majority, or are otherwise emancipated.

C. P. 109, 110.

(A) *Tutor ad hoc*:

Tutor ad hoc may be appointed.

Norwood vs. Barbin, 18 A. 611.

2. He must take oath.

Killelea vs. Barrett, 67 A. 868.

(B) Office of curator ad litem abolished, notwithstanding C. P. 35. Emancipated minor may stand in judgment.

Richardson vs. Richardson, 88 A. 640.

959. When Minor Absent—If a minor be absent, the judge, with the advice of a meeting of relations, or of friends if he have no relations, shall appoint for such minor a tutor and under-tutor as above provided.

C. P. 649.

960. Tutor—Refusal to Serve—If the person appointed as curator or tutor have reasons to assign for not serving as such, he must, within ten days after having had notice of his nomination, if he reside in the place, deliver to the clerk of the court which has nominated him a written opposition, setting forth the grounds of his refusal to act.

If he reside not in the place, the delay of ten days granted for filing his opposition, shall be increased at the rate of one day for every four leagues, counting the distance from his residence to the place where the court which made the appointment is held.

C. P. 970.

961. Summary Trial of Question of Refusal—The judge shall decide summarily on the merits of such opposition; if the reasons assigned be sufficient he shall proceed to appoint another tutor or curator; in the contrary case he shall order him to act and pay the costs of the opposition, leaving him the right to appeal from his decision as hereafter prescribed.

C. P. 580, 1084.

962. Curators to Interdicts—The rules above prescribed with respect to the tutorship of minors, shall govern as regards the curatorship of interdicted persons.

963. Curators to Absentees—Curators must be appointed to represent persons absent from the State, who have

property in the State, and are unrepresented therein. Such appointment shall be made by the judge of probate of the place where the property lies. The person claiming such curatorship shall be appointed, if he have the required qualification, and give the surety which the law directs.

C. P. 116, 194, 972.

Curators of absent and unrepresented persons:

When not appointed: No curator can be appointed to one who is domiciled here though he be absent and unrepresented. Absentee means one who is domiciliated out of State, or who has resided here but has departed.

Dreville vs. Cucullu, 18 A. 685; Dupuy vs. Hunt, 2 A. 562.

964. Tutors and Curators Ad Hoc—The above provisions shall not be so construed as to prevent persons having claims against a minor, or a person absent, from pursuing the same, previous to a curator or tutor having been appointed, as above prescribed; but, in such cases, the person claiming must, in his petition, pray the court to which it is addressed to appoint a tutor or curator *ad hoc* to defend the minor or absent person in the action.

C. P. 115, 116, 195, 260, 946; Keenan vs. Ahern, 34 A. 685.

When curator ad hoc does not represent absentee:

1. Non-resident can not be brought into court by substituted service of process on curator *ad hoc* except where property is attached or otherwise subjected to process of court.

Laughlin vs. Louisiana Ice Co., 85 A. 1135; Pennoyer vs. Neff, 95 U. S. 714; Harkness vs. Hyde, 98 U. S. 478; Brooklyn vs. Ins. Co., 99 U. S. 862; overruling 19 A. 86; 29 A. 821, etc.; C. P. 116, 195.

2. Curator can not be appointed to receive notice of protest.

Weaver vs. Penn et al., 27 A. 180.

§ 3.

Of the Appointment of Curators to Vacant Successions and to Absent Heirs.

965. Curators—Appointment—The mode of proceeding to be pursued by courts of probate, in making inven-

tories and sales of estates belonging to vacant successions, is provided by special laws.

The following provisions relate only to the appointment of curators charged with the administration of such estates.

C. P. 960, 1089.

966. Appointment—Prayer For—Mode—One wishing to be appointed curator to a vacant estate, or to the estate of a person absent, must make his demand by a petition addressed to the probate judge of the place where the succession has been opened.

Notice of application :

1. Ten days' notice must be given before letters of administration can be granted.

Succession of Talbert, 16 A. 230; Succession of Gusman, 35 A. 406.

2. Ten days' notice required in all cases of application, even where successor must be appointed forthwith to party failing to qualify.

13 A. 582.

967. Advertisement of Application—On the filing of such petition, the judge shall give public notice of the same, and direct, if any opposition be intended, that the same be made within ten days from the date of the notice.

968. In English Only—The notice required shall be given by advertisement in the English language only.

C. P. 668; Constitution, Art. 154.

By Act 88 of 1880, judicial advertisements must be published in French language.

969. In Official Journal—This advertisement must be published in the official journal of the parish, selected and contracted with in the manner prescribed by special laws, and every publication and advertisement in any other

paper than the one so selected shall, during the term of such selection and contract, be null and void for any legal purpose.

If there be no official or other paper published in any parish of this State, such advertisement may be authorized to be made in a paper published nearest thereto.

C. P. 669.

970. Opposition to Appointment—Opposition to applications for a curatorship must be made within ten days of the date of the notice that such application has been made.

When opposition timely:

1. It would seem that opposition to application for administration is in time, though after ten days, if no appointment has yet been made.

Succession of Price, 35 A. 907.

2. So of opposition to accounts of administration, which are in time if before homologation.

Succession of Price, 35 A. 907; Succession of Picard, 33 A. 1135; Succession of Block, 6 A. 810; Succession of McKinney, 4 A. 25; Hook vs. Richardson, 4 L. 571.

971. Opposition in Writing—Such opposition must be in writing, and signed by the opponent or his advocate; it must be delivered to the clerk of the court before which the demand has been brought.

972. Opposition—Grounds—Bond—This opposition can only be founded on the allegation of a better right on the part of the person opposing, than of the person claiming the curatorship, otherwise it shall be rejected with costs, and shall not prevent the confirming of the curatorship to the person demanding it, if he possess such requisites and give such security as the law calls for.

C. P. 963.

973. Summary Trial—If the opposition rests on a right of preference alleged by the person opposing, the court shall decide on the opposition in a summary manner, and

shall confer the curatorship according to law, with a right of appeal to the other party, however, as hereafter declared.

C. P. 580, 876, 1034.

§ 4.

Of the Benefit of Inventory.

974. Benefit of Inventory—The heir who wishes to enjoy the benefit of inventory, and to have time for deliberating, shall, as soon as he is made acquainted with the death of the person to whose succession he is called, present a petition to the judge of probate where the succession is opened, to declare his intention of taking the time allowed to deliberate, and shall pray that an exact inventory be made of the succession property, after removing the seals, if any have been affixed.

975. Inventory—The judge to whom such petition is presented, shall appoint some notary to make an inventory of the property of the succession.

976. Appointment of Administrator—During the time allowed for making the inventory and for deliberating, the judge shall appoint an administrator to retain the property, if any of the creditors of the succession shall require it, and in making such appointment he shall prefer the beneficiary heir; such administrator shall give good and sufficient security, in the same manner as curators of vacant estates and absent heirs, unless the said administrator shall prefer giving such security by a special mortgage.

(A) Administration:

1. Heir accepting with benefit of inventory can not be put in possession until after administration has been closed.

Succession of Linton, 27 A. 351; 12 E. 333; Succession of Ogden, 19 E. 457; 7 E. 42; Succession of Roffignac, 21 A. 364; Westholtz vs. Westholtz, 9 A. 298; Succession of Story, 3 A. 502; Goux vs. Moncia, 5 A. 748.

3. Heir accepting unconditionally may stop administration and take possession.

Brashear vs. Conner, 29 A. 349; 21 A. 278; *Succession of Dunford*, 25 A. 56.

(B) Provisional administrator :

Provisional administrator not known now to our law.

Succession of Clark, 30 A. 801, 806.

Person appointed to preserve property is more of a keeper or guardian than administrator.

Id.

(C) When no administration will be ordered :

1. Administrator will be appointed when some of the heirs are beneficiary and there are debts, and creditors or heirs of age demand administration.

Succession of Clark, 30 A. 807.

2. *Aliter* where there are no debts.

Brashear vs. Conner, 29 A. 347; *Succession of Baumgarden*, 35 A. 133; *Succession of Walker*, 32 A. 321; *Burton vs. Brugler*, 30 A. 478; *Succession of Welsh*, 36 A. 702; *Succession of Sutton*, 20 A. 150.

3. Mere allegation of debt not sufficient to justify appointment; *prima facie* case must be made out.

Succession of Sarrazin, 34 A. 1170.

(D) Who may be appointed administrator :

1. Woman interested as heir may be appointed administratrix.

Succession of Block, 6 A. 810; *Succession of Penney*, 10 A. 290; *Succession of Williamson*, 3 A. 262; *Ferrar's Administratrix vs. Lambeth*, 11 L. 108; *Succession of Sloane*, 12 A. 610; *overruling Cusa vs. Calvana*, 4 A. 538, and *Carraby vs. Carraby*, 7 N. S. 466.

2. Where administratrix is married woman, her husband acts conjointly with her.

Succession of Gusman, 36 A. 300.

3. Tutrix of minors may administer estate until opposed by creditors.

State ex rel. Jones vs. Shreveport, 33 A. 1247; *Succession of Sutton*, 20 A. 150; *Bryan vs. Atchison*, 2 A. 463; *Succession of Story*, 3 A. 502; *Monget vs. Penny*, 7 A. 134; *State vs. Heirs of Leekie*, 14 A. 641; *Vincent vs. D'Aubigne*, 19 A. 529; *Dickason vs. Smith*, 5 A. 197.

(E) Administrator acts for succession :

Heirs can not sue for debts or damages due estate under administration. Their recourse is against administrators.

Sloan vs. Stevenson & May, 24 A. 280; *Succession of Ogden*, 10 R. 457; 12 R. 41; 12 R. 323.

F) Giving bond:

1. Failure of executor to give bond *ipso facto* vacates his appointment.

Succession of Feray, 81 A. 777.

2. Administrator's bond enures to benefit of heirs and creditors.

Goux vs. Moncla, 80 A. 744.

977. Creditors and Legatees—Action By—After the expiration of the time for making the inventory and for deliberation, the creditors and legatees of the succession, or any of them, may present a petition to the judge of probate of the place where the succession is opened, and demand that the beneficiary heir be cited and made to declare whether he accepts or refuses the succession.

Prior to and up to time of such action, succession may be renounced if heir have done nothing indicating acceptance.

Succession of Richardson, 14 A. 1.

978. Renunciation of Heir—If on such demand the beneficiary heir shall offer his renunciation in due form, he shall be dismissed with costs, and the administrator of the succession shall proceed to sell the property and pay the debts, under the authority of the judge of probate who appointed him, in the same manner curators of vacant estates are required to do.

979. Call on Heir to Accept or Renounce—Where the presumptive heir of a person deceased has not prayed for time to deliberate, every creditor or legatee of the deceased may, ten days after the opening of the succession, cite such heir to appear before the judge of probate, and call on him to declare whether he accepts the succession or refuses it.

C. P. 974.

980. Acceptance—Effect—If the heir thus cited declares

that he accepts, or if he be silent or make default, he shall be considered as having accepted the succession purely and unconditionally, and may be sued as if he had done so.

(A) What will not amount to an acceptance:

1. Institution of suits purely conservatory in character with suitable reservations.
Succession of Lamm, 40 A. 312.
2. Sale of residuary rights, remaining to heir after administration.
Succession of Webre, 85 A. 267.

(B) What will amount to an acceptance:

1. All acts treating the property as his own by heirship, such as selling it;
Duplessis vs. White, 6 A. 514; Benedict vs. Bonnot, 39 A. 972; Olaus vs. Burgess, 12 A. 143.
Or compromising claims.
Succession of Plunkett, 12 A. 553.
2. Appearance in judicial proceedings to assert rights as heir.
Anderson vs. Cox, 6 A. 12; Truxillo vs. Truxillo, 11 A. 416; McQueen vs. Sandel, 15 A. 140; Brashear vs. Conner, 29 A. 347; Sanford vs. Toadvine, 15 A. 170; White vs. Blanchard, 19 A. 60; Succession of McCall, 28 A. 718; Succession of Zeringue, 21 A. 717.
3. Mortgaging the property.
Scott vs. Briscoe, 36 A. 297.
4. Or otherwise acting as owner.
McMasters vs. Place, 8 A. 431.
5. Suing as heir.
Cody vs. Broad, 29 A. 347.
6. Paying debts of succession without reservation.
Loubierre vs. LeBlanc, 12 A. 210; 8 N. S. 556.

981. Heir May Ask Time—But if he declares that he wishes for the benefit of inventory and for time to deliberate, the judge shall delay pronouncing on the matter, until the expiration of the time allowed.

982. Heir—Final Action By—But if, when the creditor

or legatee makes such demand, the time allowed by law has already expired, the heir shall be obliged to declare his intention within a time to be allowed by the judge, not more than ten days from that on which he ought to have given his answer.

C. P. 974.

§ 5.

Of Settlement of Successions.

983. Courts of Probate—Action of Revendication—All debts in money which are due from successions administered by curators appointed by courts and by testamentary executors, shall be liquidated, and their payment enforced by the court of probate of the place where the succession was opened.

The case is different with respect to the action of revendication and other real actions which shall be instituted against such estates; they may be brought before the ordinary tribunals, provided that the court of probate shall not have jurisdiction in suits where the amount involved shall exceed five hundred dollars.

(Inoperative as to money limit. See Art. 80 of Constitution.)

C. P. 924, 988, 993, 1054.

1. Suit against executor in that capacity must be brought before court in which succession is opened.

Gee vs. Thompson, 37 A. 598.

2. Probate court can order sale of mortgaged property at instance of mortgage creditor.

Wiedom vs. Buckner, 81 A. 52; Mason's Executor vs. Fuller, 12 A. 6; Williams vs. Hunter, 13 A. 477; dicta to the contrary in Union Bank vs. Marigny, 11 E. 211; Graham vs. Markey, 23 A. 267; State vs. Judge, 20 A. 811, are all obiter.

3. And only probate court has power to order sale of succession property seized under *Acti facias*.

Houston vs. Childers, 24 A. 472; Collier vs. Stanbrough, 6 E. 234; Leonard vs. Stanbrough, 9 E. 254.

But where property is specially mortgaged, it may be seized and sold *via executiva* by court of ordinary jurisdiction.

Dupuy vs. Bemiss, 2 A. 518; Boquille vs. Faille, 1 A. 204.

984. Presentation of Claims—No bearer of a claim of money against a succession administered by a curator appointed by a judge or by a testamentary executor, shall commence an action against such succession, before presenting his claim to the curator.

1. Presentment of claim condition precedent to suit to enforce claim against succession.

Hearsey vs. Bates, 85 A. 801; Vavasour vs. Mouton, 84 A. 1045.

But want of presentment is matter of plea *in limine*.

8 A. 408; 2 R. 264; 1 R. 391.

2. Party suing on a recognized claim must pay costs.

Succession of Romero, 29 A. 493; Berens vs. Executors of Boutte, 81 A. 115; Succession of Richmond, 85 A. 863; 80 A. 868; 82 A. 753.

3. Acknowledgment of administrator suspends prescription during his gestion.

Renshaw vs. Stafford, 80 A. 853; Succession of Romero, 29 A. 498; Troendel vs. Dubouchel, 82 A. 753; Succession of Patrick, 80 A. 1071; Succession of Richmond, 85 A. 863; 82 A. 337; 83 A. 305; Succession of Mansion, 84 A. 1247; Morris vs. Cain, 89 A. 722.

And operates as estoppel against subsequent denial.

Succession of Richmond, 85 A. 863.

4. Alleged creditor must prove his ownership of the debt. His position is not assimilated to bearer of a promissory note.

Succession of Gale, 21 A. 488.

5. Defendant administrator can not plead exception of want of amicable demand of the smaller sum, when he has refused payment of the larger.

Figuras vs. Benoist, 11 A. 683.

985. Approval by Curator or Testamentary Executor or Administrator—If such claim be liquidated and be acknowledged by the curator or testamentary executor or administrator, he shall write on the evidence of the claim,

or on a paper which he shall annex to it, a declaration signed by him, and stating that he has no objection to the payment of such claim; after which the bearer of such claim shall submit it to the judge, that it may be ranked among the acknowledged debts of the succession.

1. Writing on back of claim approval is not exclusive mode of acknowledging debt of succession. Confession of judgment is equivalent; so is giving of note.

Cloutier vs. Lemee, 33 A. 355; *Heirs of Hornsby*, 32 A. 337; *Renshaw vs. Stafford*, 30 A. 353; *Succession of Mansion*, 34 A. 1247; *Wilson vs. Mrs. Early*, 18 A. 219.

So is placing a debt on account by administrator.

Maraist vs. Gullbeau, 31 A. 713; *Porter vs. Hornsby*, 32 A. 337.

2. Acknowledgment may be written on other piece of paper.
Crawford vs. Childress, 23 A. 135; *Troendel vs. Debouchel*, 33 A. 733.

3. Attorney at law can not allow claims against succession.

Succession of Winn, 30 A. 703; *Succession of Poussin*, 27 A. 296; but see *Succession of Yarborough*, 16 A. 260, 261, and *Maraist vs. Gullbeau*, 31 A. 713, where letter of acknowledged attorneys of administrator was an acknowledgment.

4. Executor or administrator can not revive a prescribed debt by any acknowledgment.

Dickson vs. Succession of Compton, 24 A. 83; *Smith vs. Coon*, 22 A. 46; *Sevier vs. Succession of Gordon*, 21 A. 373; 12 R. 16; *Miltenerberger vs. Withrow*, 24 A. 133; *Whittaker vs. Swain*, 9 A. 123; *Lafon's Heirs vs. Executor*, 3 N. S. 716; *Flanner vs. Lecompte*, 23 A. 133; *Eiehl vs. Martin*, 29 A. 16.

986. Action on Claim—If the claim be not liquidated, or if the curator or testamentary executor or administrator have any objection to it, and consequently refuse to approve it, the bearer of the evidence of such claim, whatever may be its amount, may bring his action against the curator or administrator in the ordinary manner, before the court of probate where the succession was opened, or before the district court, according to the amount involved, and may obtain judgment in the same manner as in other cases.

C. P. 164, 924.

1. Creditor with unliquidated and unacknowledged claim may proceed both—

(a) By opposition to account.

State vs. Judge, 16 A. 371; *Succession of McCalop*, 16 A. 224; *Succession of Mouton*, 28 A. 527; *Succession of Irwin*, 33 A. 64; 10 L. 350; 5 A. 702.

And opposition must be specific and explicit.

Succession of Bofenschen, 29 A. 711.

(b) And by an independent and direct action.

Stafford vs. Succession of McIntosh, 38 A. 636.

And not by rule, particularly when claim is not liquidated.

Succession of Jacobs, 5 R. 271.

2. And no *fi. fa.* issues on judgment recognizing a claim against a succession.

State ex rel. Gausson vs. Judge, 21 A. 44; *Legendre vs. McDonogh*, 6 N. S. 514; *Hall & Lisle vs. Selden*, 29 A. 118.

3. Though no execution issues, decision of court is a judgment prescriptible in ten years.

Succession of Irwin, 33 A. 63.

4. When claim acknowledged by administrator, prescription runs from date of acknowledgment.

Succession of Poussin, 27 A. 297; but see to the effect that acknowledgment completely suspends current of prescription pending administration, *Renshaw vs. Stafford*, 30 A. 833; *Succession of Romero* 25 A. 495.

5. Until creditor's claim is acknowledged or liquidated he can not demand account or interfere in administration.

Miguez vs. Delahoussaye, 25 A. 231; 5 R. 96; 8 A. 407.

987. Concurrent Payment—But the creditor who has obtained such judgment, or the acknowledgment of his debt, can only obtain the payment of it concurrently with the other creditors of the succession, unless it be such a privileged claim as ought to be paid without delay.

C. P. 1053, 1054.

(A) And if creditor issues *fi. fa.* on judgment against unliquidated succession, he may be enjoined.

Ledoux vs. Breaux, 27 A. 190.

(B) Right of special mortgage creditor:

Special mortgage creditor may proceed *via execution* against property though in succession.

State ex rel. Sauve. vs. Judge, 21 A. 311; 11 R. 212; 7 R. 508; *Gally vs. Dowling*, 30 A. 323; *Lamorère vs. Cox*, 52 A. 246; *Durand vs. Delahoussaye*, 28 A. 622; *Bognille vs. Fallie*, 1 A. 204; *Lavillebeuve vs. Heirs of Frederic*, 20 A. 574; *Succession of Wilson*, 12 A. 591.

But for unsatisfied balance he must go to probate court, charged with settlement of succession.

11 R. 208.

988. Tableau of Debts—When the time for paying creditors shall have arrived, the curators or testamentary executors shall call together all the creditors of the succession, in the manner provided by law, to receive what is due to them, as also interests and costs, if the estate be sufficient for that purpose, or to determine the order in which they shall be paid, if it be insufficient.

C. P. 1058, 1054.

989. Interest on Claims—As the creditors of estates administered by curators or testamentary executors or administrators can only obtain payment after certain delays, interest shall be allowed on their debts, if the estate be sufficient, from the death of the debtor, if they were due at that time, or from the date when they became due, if it were after that event, although no judicial demand may have been made.

Interest on debts due by estates:

Interest runs from time debt was due.

Gonsoulin vs. Migues, 5 A. 565; *Fusilier vs. Babineau*, 14 A. 754; *Conrad vs. Burbank*, 24 A. 18; *Succession of Richmond*, 35 A. 954.

990. Sale of Succession Property—It shall be the duty of the several judges of probate, on the application of the creditors or any creditor of a vacant estate, to cause, on the requisite advertisement being made, so much of the property of the said estate as is necessary to pay the debts

of the same which may be due, to be offered for sale, and sold at public auction to the highest bidder for cash, if the creditors require it, and if on thus offering said property for sale, the appraised value should not be bid and obtained, then the same, in not less than fifteen nor more than twenty-five days from the time it is thus offered, be sold at public auction, and, after public advertisement, to the highest bidder, for what it will bring on a credit of twelve months; provided, however, that in all sales of effects belonging to successions, minors or interdicted persons on a credit, the purchaser shall give a twelve months' bond, with good security, to be approved by the representative of the estate, minor or interdicted person, and a mortgage retained on the property sold; if it be mortgaged property, the bond to be duly recorded, so as to operate a mortgage, such bond to have force and effect as twelve months' bonds taken in sales under writs of *feri facias*; and the collection of such twelve months' bonds shall be enforced in the same manner as twelve months' bonds taken in accordance with articles seven hundred and nineteen and seven hundred and twenty of the Code of Practice, upon execution issued upon such twelve months' bonds by the clerk of the court which issued the order for sale of the property, and such clerks are hereby authorized and required to issue such executions on the demand of any person having the legal right to control such bond.

C. P. 719, 720.

(A) Sale of succession property:

1. *By whom order for sale issued. Power of clerk:* In all cases order may be issued by judge himself, and in most cases it must, but under Sec. 4 of Act 43 of 1882 defining powers of clerks, the clerk in case of absence or recusation of judge may issue order for sale on application of succession representative, accompanied by a statement of debts of succession.

Act 43 of 1882.

- (a) It seems that if application be by creditor, or if judge be not absent and application emanates either from creditor or succession representative, clerk has no power to issue order of sale.

Davie vs. Scriber et al., 88 A. 652; Mason vs. Williams, 12 A. 8.

- (b) *Semble*, that only in above cases can clerk act, for his judicial powers are strictly construed.

State ex rel. Boyd vs. Green, 84 A. 1037; Succession of Price, 5 A. 907.

(B) *Clerk can not approve tableau:*

It further appears that, though clerk may, in above cases, order sale of succession property, he can not approve tableaux of debts, homologate accounts of administration or authorize administrators to pay debts.

Succession of Price, 85 A. 907.

(C) *Order of sale protects adjudicatee:*

Where clerk has power his order is equivalent to that of judge and protects adjudicatee.

Woods vs. Lee, 21 A. 505; Succession of Gurney, 14 A. 622; Succession of Boyd, 12 A. 611; Mitchell, Executor, vs. Levi, 23 A. 634; Succession of Hebard, 18 A. 485, 493; Nesom vs. Weiss, 84 A. 1010; Duckworth vs. Vaughn, 27 A. 599; Succession of Vaughn, 26 A. 150; McColloagh vs. Minor, 2 A. 466; Wright vs. Cummings, 19 A. 353.

(D) *Who may apply for sale:*

1. Creditor; but only when acknowledged by administrator or by judge.

Succession of Winn, 30 A. 702; Succession of Connolly, 5 A. 733.

- (a) He may rule administrator to show cause why property should not be sold.

Vincent vs. D'Aubigne, 19 A. 529; Mason vs. Williams, 12 A. 8.

- (b) Proceedings contradictorily with succession representative are necessary.

Succession of Macias, 86 A. 444; citing 29 A. 560; 33 A. 343; 34 A. 804; 10 A. 238; 8 A. 408.

- (c) And where sale takes place thus under a mortgage, it may be sold if it bring only two-thirds of appraisal.

Id.; see "Appraisalment," *infra*.

2. Executor or administrator, as representative of all the creditors, may initiate and perfect the sale, which may be for two-thirds of appraisalment.

Succession of Hood, 83 A. 470; Succession of Weber, 16 A. 63.

(E) Time of application for sale:

It may be made before filing of tableau or account, and creditor need not rule administrator or succession representative to account.

Succession of Tabor, 33 A. 844; Succession of Decuir, 22 A. 871; Succession of Smith, 9 A. 109; Bank vs. McDonogh, 7 A. 232; Succession of Ogden, 10 R. 457; Heirs of Brown vs. Jacobs et al., 24 A. 580.

991. Sale, Continued—It shall be the duty of the judge of probate in all cases of vacant estates, on the application of the creditors or any creditor thereof whose debt shall not then be due, to sell, after the usual advertisements, upon the conditions contained in the preceding article, so much of the estate as will be sufficient to pay the claim or claims of the creditors who shall make the application, and on such terms of credit as will correspond with the falling due of the several claims of the creditors.

C. P. 668, 686.

992. Sale, Continued—The principles contained in the two preceding articles shall apply to all successions accepted with benefit of inventory, whether the heirs or minors are of age, and to all successions administered by administrators.

993. Payment to Creditors—Ten days after the classification and order of the payments shall be fixed by the court of probate, and as often thereafter as a majority of the creditors in amount may require it, it shall be the duty of the curator to account for before the judge of probate and pay over to each of the creditors or their representatives, a due proportion of the sums which he may have in his hands; and on his failing to render his account, ten days after being notified of the demand of the creditors to that effect, or to make payment within ten days after the account rendered, execution shall issue of course in the name of all the creditors of the estate or of

those to whom he has failed to make payment, against all the property of said curator, which shall be sold, after the usual advertisements, for what it will bring in cash.

C. P. 988, 1067.

994. Execution Against Tutors and Curators—When tutors and curators of minor heirs administer a succession with the benefit of inventory, and the said tutors or curators fail to pay over the money as specified in the preceding articles for the government of curators of vacant estate, execution shall issue against said tutors or curators in the same manner as is provided in said article against the beneficiary heir and curator of vacant estate, and on said execution, the property of said tutor or curator shall be sold in the same manner as that of a beneficiary heir and curator of vacant estate.

995. Foregoing Rules Applicable—When—What is said in this section in relation to the liquidation of estates, only applies where such estates are administered by curators or other persons appointed by a court or by testamentary executors.

996. Actions Against Heirs—The case is different when such estates are in the possession of heirs either present or represented in the State, although all or some of those heirs be minors; for in such case the actions for debts due from such successions shall be brought before the ordinary tribunals, either against the heirs themselves if they be of age, or against their curators if they be under age or interdicted.

C. P. 65, 66; *Watts vs. Frazer*, 5 L. 396.

Suit against heirs:

1. Will lie—

(a) Only to the extent of their interest in estate when they have accepted under benefit of inventory.

Banker vs. Durand, 26 A. 315; *Zuberbier & Behar vs. l'homme*, 34 A. 1048.

And minors always accept under benefit of inventory.
Succession of Hebert, 27 A. 800.

(b) When heir is absent, appointment of curator *ad hoc* is proper.

Randolph vs. Chapman, 21 A. 481.

§ 6.

Of Accounts to be Rendered by Administrators of Estates, and Other Persons.

997. Accounts—Who May Compel Rendition—The judges of the courts of probate who have appointed or confirmed the tutors or curators of minors, interdicted, absent, or other persons unable to administer their own property, testamentary executors, curators of vacant estates, of absent heirs, or other persons administering successions, alone have the power of compelling them to account and pay over what they may be found to owe.

C. P. 924, 1007; 12 A. 537; 31 A. 718; 20 A. 580; 9 A. 536; 9 A. 400; 13 A. 514; 3 R. 3.

998. Accounting—How Demanded—Therefore, if a minor, a person under interdiction when restored to his rights, an absentee whose property has been administered by a tutor or curator, wishes to make his tutor or curator account for his management, he shall present his petition for that purpose to the court of probate by whom such tutor or curator was appointed, praying that he may be cited to appear in the ordinary manner, and that he may be decreed to give an account of his administration, or pay such sum as he may suppose to be due.

C. P. 1000, 1023.

999. Demand By Minor —The minor who has a right to demand his account, can only institute the action in his own name, after the attainment of full age. If he has not reached the age of majority, he shall be assisted by the under-tutor, even if he be emancipated, unless he be a married man.

If the minor be a married woman, she may sue and be sued, even in the case provided for by this article; provided, she acts under the authority and with the consent of her husband, though himself a minor.

C. P. 958.

1000. Presentation of Claims By Heirs—When the heirs or other persons entitled to successions which are administered by curators appointed by a judge, or by testamentary executors, shall present themselves or send their powers to reclaim such successions, they shall present a petition to the judge who appointed or confirmed these curators or executors, praying that they may be cited and compelled to account for their administration.

18 A. 155; 12 A. 445; 9 L. 289; 10 L. 478; 36 A. 813.

All heirs need not join in demanding account.

12 A. 268.

1001. Filing Proofs—The said heirs or other persons claiming, shall file along with their petition all such proofs as may go in support of it, to the end that the curator or testamentary executor may be made acquainted with them.

Succession of Lorenz, 41 A. 1098.

1002. Summary Hearing—The judge shall pronounce on his claim in a summary manner, as soon as the time allowed for the curators or executors to answer shall have expired.

1003. Putting in Possession—When—Order to Account—If from the examination of the testimony produced in support of the prayer, the judge discovers that the petitioners are entitled to the succession, he shall put them in possession of it, and shall direct the curator or executor to render an account within a reasonable time to be fixed by him.

38 A. 865.

1004. Objections to Account—If the curator or executor obeys the order and renders his account, the heirs or other claimants shall, within three days afterwards, file their written objections, if they have any, signed by themselves or their counsel, to each item of the account to which they object, or of which they pray for the rejection.

C. P. 988.

Opposition to account:

1. Must be in writing.

Succession of Blakeley, 12 R. 155.

2. At what time may be filed:

May be filed at any time before actual homologation.

Succession of Price, 35 A. 907; Succession of Macarty, 3 A. 383;

Succession of Mouton, 23 A. 528; Succession of Hardesty, 22 A.

332; Succession of Scott, 41 A.

3. By whom filed:

(a) Attorney claiming fees for legal services.

Succession of Sterry, 38 A. 855.

(b) An heir.

Succession of Romero, 26 A. 584; Succession of Barbour, 17 A.

173; 28 A. 607; 13 A. 173; Succession of Bozant, 5 A. 709.

(c) Mortgage creditor.

Tureaud vs. Gex, 21 A. 255.

(d) Ordinary creditor.

Succession of Hughes, 14 A. 863; Cavaroc vs. Fournet, 28 A. 537;

Succession of Glover, 2 A. 2.

4. Who can not oppose account:

(a) Joint executor.

5 A. 118.

(b) Or other succession representative.

Succession of Prudhomme, 28 A. 229.

(c) One who has not proved his claim.

Succession of Cabouret, 9 A. 520.

(d) One who is on account and succession is fully solvent.

Succession of Gohs, 37 A. 429.

5. Opposition must be specific.

Succession of Bofenschen, 29 A. 711.

1005. Reference to Auditors—The judge may himself

decide on those objections, or refer them to auditors to make a report on them to him.

C. P. 447.

1006. Costs of Proceeding—If from his own examination, or the report of the auditors, the judge thinks the objections unfounded, he shall condemn the party making them to pay the costs; if, on the other hand, he considers them well founded, he shall sentence the curator or executor, to pay the costs of the proceeding.

1007. Balance of Account—Interest—If, from a scrutiny of the account, the curator or executor shall appear to owe a balance, he shall be sentenced to pay it to the heirs or other claimants, with interest from the day of judgment; if the balance is in his favor, the petitioners shall be adjudged to pay him in the same manner, and he may, until such payment be made, retain the property of the succession which may be in his hands.

(A) *When account not binding on creditors or heirs:*

1. When they have not been cited.

Succession of Winn, 30 A. 708; 8 R. 121; Succession of Day, 2 A. 383.

(B) *Tableau of distribution:*

1. Homologation binds all parties.

Succession of Egana, 18 A. 59; Succession of Wellmeyer, 34 A. 33; Succession of Commagere, 38 A. 832; Succession of Brown, 17 A. 25; 8 A. 883; 20 A. 359; 23 A. 538; 22 A. 332; Castillo vs. Elliott, 13 A. 33; 33 A. 1575; Succession of Durnford, 1 A. 96.

2. Homologating judgment should be signed.

Succession of Haggerty, 27 A. 667; Succession of Ashbridge, 1 A. 36; Succession of Macarty, 8 A. 384.

3. Prescription in favor of administrator runs from homologation of account.

Courtade vs. Chamberlain, 4 A. 368; Wade vs. Caspari, 24 A. 211; Walling vs. Howell, 34 A. 1105.

1008. Rules—When Applicable—The rules above

established shall be observed in all cases of petition for an account brought before the courts of probate.

1009. Attorney for Absent Heirs—If the heirs or others entitled to successions which are administered by curators appointed by a judge, do not appear or send their powers before the expiration of the time at which such administrators are to render their accounts, according to law, it shall be the duty of the judge of probate who appointed or confirmed them, to name a counsel for the absent heirs, if there be not one already, to demand an account from such administrators, and to make them pay the balance due, if there be any, into the treasury of the State.

1010. His Duty—The counsel thus appointed shall present his petition to the judge of probate, and shall cause the curator or executor to be cited and directed to render his account within the time determined by the judge.

1011. Refusal to Account—If at the expiration of such time he refuses or neglects to render his account, the judge shall issue a mandate directing him to comply with the provisions of the law, and if within the time allowed to obey this mandate, the administrator persists in refusing to render an account, without tendering a good reason for the delay, the judge shall order him to be arrested and imprisoned until he renders the account.

1012. Imprisonment—Distringas—When the tutor or curator of a minor, interdicted or absent person, or of a vacant estate, refuses to render an account to those who have a right to demand it, such person may compel him, either by praying that he be imprisoned until he do render it, or by having his property and income distrained, or by using any other means which the law may afford.

C.P. 238; 14 A. 779; 81 A. 117; 81 A. 750.

§ 7.

Of the Removal of Tutors, Curators and Testamentary Executors.

1013. Removal of Tutors, etc.—Tutors and curators of minors, interdicted and absent persons, and curators of vacant estates and absent heirs or other administrators of successions, may be removed by the court of probate which appointed them, for any of the causes specified by law.

C. P. 1013.

Causes for dismissal of succession representative.

1. His permanent departure from State, particularly when he leaves no representative with full power.

Succession of Winn, 27 A. 636; Yerkes vs. Brown, 10 A. 94; Scott vs. Lawson, 10 A. 548; Succession of Penny, 10 A. 234; 9 A. 334; 13 A. 32.

2. His failure to furnish bond; such failure operates *ipso facto* vacation of office.

Succession of Guildry, 40 A. 571; Sharkey vs. Bankston, 30 A. 391; Succession of Bobb, 27 A. 544; 1 A. 21; 28 A. 800; Succession of Faray, 3 A. 727.

3. His failure to render account.

Brown vs. Ventress, 24 A. 187; Ford vs. Kittredge, 20 A. 124; Reed vs. Crocker, 12 A. 445; Collins vs. Hollier, 18 A. 585.

But failure to file account places succession representative in default only—

- (a) When he has been ordered to account.

Succession of Head, 28 A. 800; Congregation vs. Farrelly, 24 A. 533; McClelland vs. Eldeman, 5 A. 563; Succession of Baum, 9 A. 412; see, however, *contra* Gray vs. Waddell, 23 A. 1023; 24 A. 528; 14 A. 536; 37 A. 407.

- (b) When the account rendered, which is alleged to be insufficient, has been opposed and overruled.

Succession of Calhoun, 28 A. 523.

- (c) When he has funds to account for.

Succession of Toy, 14 A. 536.

4. His failure to deposit money in bank.

9 A. 412; 7 R. 477; 6 A. 428; 34 A. 533; Reed vs. Crocker, 12 A. 445; Succession of Pasquier, 11 A. 279; 23 A. 96; 23 A. 584.

But requirement of deposit in bank applies only to money, not bills or stocks.

Peale vs. White, 7 A. 451.

1014. Of Testamentary Executors—Testamentary executors may be deprived in the same manner, and for the same causes.

(A) Removal of succession representatives:

1. Who may demand removal:

(a) Any one of the heirs.

Kendrick vs. Kendrick, 19 L. 81; 12 A. 145.

But not until the will is set aside.

Peale vs. White, 7 A. 451.

(b) Any creditor or other person concerned.

28 A. 166; 15 A. 214; McComas vs. Rougillo, 4 A. 128.

But not where alleged creditor's claim is denied.

Succession of Connally, 5 A. 753.

2. Who can not demand removal: Public administrator.

Succession of Burnside, 34 A. 728; Succession of Winn, 26 A. 102.

(B) Direct action to remove:

1. When necessary:

When succession representative, *e. g.*, administrator, has been appointed and qualified.

Succession of Guilbeau, 25 A. 724; Dwight vs. Simon, 4 A. 494; but see Yerkes vs. Brown, 10 A. 94.

2. When not necessary:

(a) When he fails to give required security.

Succession of Guildry, 40 A. 871.

(b) When he fails to deposit money in bank.

Peale vs. White, 7 A. 449.

(C) Suit for removal not transferable to federal court.

Succession of Burnside, 34 A. 730; Gaines vs. Fuentes, 2 Otto, 18.

(D) No suspensive appeal from order of dismissal.

Succession of Townsend, 37 A. 408.

But devolutive appeal allowed.

Succession of Bedford, 38 A. 244.

(E) Appointment of provisional representative.

Succession of DeFelchier, 1 A. 20; McClelland vs. Bideman, 5 A. 564.

1015. Who May Demand Removal—It shall be the duty of every person to acquaint the judge of probate with the

fact rendering it proper to remove the tutor or curator of a minor or person interdicted.

1016. Duty of Judge—The judge, when made acquainted with such fact, if he thinks there is probable cause for removal, shall direct the under-tutor of the minor, or he shall appoint a curator *ad hoc*, to commence the action.

See Succession of Hawkins, 85 A. 591; McGuire vs. Ross, 12 L. 577; Welsh vs. Baxter, 45 A. 1064.

1017. Petition and Citation—The action for the removal of the tutor or curator of a minor, shall be commenced by petition and citation, and the matter shall be conducted in the usual form.

Direct action to remove necessary.

89 A. 894; 26 A. 824; 12 A. 613; 25 A. 724; 83 A. 1023; 10 A. 94; 4 A. 494; 7 A. 449; 5 A. 563; 37 A. 406; 85 A. 312; 4 A. 486; 1 A. 20; 38 A. 244.

1018. Who May Pray Removal—The removal of curators of vacant estates and absent heirs, and that of testamentary executors, or other administrators of successions, may be prayed by any heir, creditor, or other person concerned, and the suit be conducted in the same manner as above.

C. P. 1013, 1014.

1019. Duty of Judge—The judge who shall be made acquainted with any fact sufficient to justify the removal of a curator of a vacant succession or of absent heirs whom he has appointed, may direct the counsel of the absent heirs whom he shall appoint for the purpose, to institute a suit in their name, to obtain a removal of such curator.

Attorney for absent heirs may sue for removal and for statutory penalties.

Succession of Townsend, 37 A. 406; Succession of Thompson, 13 A. 288.

§ 8.

Of the Partition of Estates.

1020. Partition—Whenever a minor, interdicted, or absent person, is interested in the partition of a succession, it shall be made by judicial authority.

C. P. 116, 122, 162, 946, 980.

1. Representation of minors in partition:

(a) By tutor, when the portion coming to the minors is not to be divided.

Succession of Aguiard, 18 A. 97; Hagan vs. Grimshaw, 15 A. 894.

(b) By tutor *ad hoc* to each minor, when the interests of the minors conflict.

Succession of Story, 5 A. 208; Gassen vs. Palfrey, 9 A. 560; Metcalfe vs. Alter, 81 A. 894; Buddecke vs. Buddecke, 81 A. 572.

2. Minors are necessary parties.

Ware vs. Vignes, 35 A. 288.

3. Representation of majors in partition:

One common agent can not represent several co-proprietors.

Metcalfe vs. Alter, 81 A. 889.

4. Partition by private sale on behalf of minors.

See Act 25 of 1878, p. 47.

1021. Partition Between Heirs—Even when all the heirs are of full age, and present, or represented in the State, the partition shall be made by the same authority, if one of them refuses the partition, or they can not agree upon the mode of making it.

1022. Partition—Where Made—All partitions of succession property shall be made by the court of probate of the place where the succession is opened.

C. P. 162, 165.

Where succession is closed partition suit may be brought where property is situated.

Succession of Bayley vs. Beemel, 80 A. 1085.

1023. Right to Partition—Every heir, whether of full age, or minor, may force his co-heirs to a partition.

1024. Petition for Partition—The heir desirous of obtaining a partition shall present his petition to the judge of probate, praying that his co-heirs may be cited to hear the sentence of partition and the mode in which it is directed to be made.

(A) Who may initiate partition:

1. Executors and administrators, as such, can not provoke partition among heirs.

State ex rel. Moore vs. Judge, 81 A. 802; Succession of Damestra, 6 A. 577.

2. Co-lessees may sue for partition.

Lewis vs. Klotz, 89 A. 266.

(B) Cumulation with other actions: Partition may be cumulated:

1. With demand for settlement of accounts.

Bayley vs. Beemel, 85 A. 778.

2. With petitory action.

Morris vs. Lalaurie, 84 A. 204.

1025. Citation to Co-heirs—The judge of probate, to whom this petition is made, shall cite to appear before him the other co-heirs, although all or any of them have their residence out of his jurisdiction.

C. P. 164.

1026. Service of Citations—The sheriffs of the different parishes, to whom such citations are directed, shall serve them on the parties concerned residing in their parishes, and return them with their report to the court which issued them, in the same manner as with ordinary citations in other cases.

C. P. 186, 582.

1027. Decree of Partition—At the expiration of the time allowed for answering the petition, the judge shall

decree the partition, direct the manner in which it shall be made, and refer the parties to a notary whom he shall appoint to make the partition.

Decree of partition:

Has full force as judgment: Hence—

(a) It can not be collaterally attacked.

Bayhi vs. Bayhi, 35 A. 529; Paul vs. Lamothe, 36 A. 318; Fowler vs. Gordon, 24 A. 270; Estate of Ronton, 11 A. 621.

(b) It can be annulled only by direct action by petition and citation.

Woolfolk vs. Woolfolk, 30 A. 146; but see Tureaud vs. Gex, 21 A. 256.

1028. Proceedings Before Notary—If, in the course of the proceedings before the notary, any controversy should arise between the parties, the judge shall decide on it in a summary manner, on motion by the first party applying to him, and on giving notice to the other parties and a reasonable time for them to answer.

C. P. 1034.

(A) Distringas issues, when:

Where one party refuses to produce property to be partitioned, a distringas will issue.

C. P. 636; Traverso vs. Row, 11 L. 497.

(B) Forms prescribed in code will be followed, but are not sacramental when inapplicable.

Paul vs. Lamothe, 36 A. 318.

(C) Inventory—when not necessary:

1. When there is only one peice of property to be partitioned.

Paul vs. Lamothe, 36 A. 318.

2. Where co-owners are not co-heirs.

Paul vs. Lamothe, 36 A. 318.

D) Rulings of court interlocutory.

Marionneaux vs. Marionneaux, 28 A. 392.

1029. Homologation—When the partition is completed y the notary, any person interested may deposit a copy

of the proceedings on it, in the office of the court which directed it, and may move that his co-heirs shall be called to state, within ten days after service of the order on them for that purpose, any reasons that they may have why the partition shall not be homologated.

1. Homologation essential if there are minors.

Russ vs. Woodham, 24 A. 487.

2. Homologation corrected only by appeal or action of nullity.

Succession of Peret, 26 A. 158; *Woolfolk vs. Woolfolk*, 28 A. 18; *Dufour vs. Latour*, 8 L. 558.

3. Proceedings after homologation:

Parties may be ruled to take part in partition of further assets.

Wilder vs. Petty, 21 A. 709.

1030. Opposition to Homologation—If the co-heirs have any objections to the manner in which the partition was made, they shall make opposition in writing to the homologation prayed for, within the time above allowed, stating the errors or irregularities of which they have to complain in said partition.

Grounds for opposing:

1. That minor not properly represented.

Succession of Agullard, 15 A. 97.

2. That immovables sold for less than their appraised value.

Ventress vs. Brown, 80 A. 1012.

1031. Supplemental Partition—When—If the judge consider the opposition well founded, in part or in whole, he shall order that the partition be rectified, and shall refer the parties to the same or another notary whom he shall appoint, who shall prepare a supplementary act of partition, in conformity with the judge's decision, a copy of which shall be on the files of the court, as well as the act of partition.

1032. Confirmation of Partition—If the judge con-

siders the opposition of the co-heirs unfounded, he shall confirm the act of partition, and it shall become final between the parties, provided the legal formalities have been observed.

SECTION II.

Of the Proceedings in Relation to All Actions Brought in the Parish Courts, as Courts of Probate.

1033. Probate Courts—Citation—Whenever a proceeding is commenced in the said courts by citation, and no shorter time has been fixed by law, the defendant shall have the same to appear in and answer, as in the ordinary tribunals of original jurisdiction.

C. P. 180, 998, 1028; 18 A. 156.

Citation not required in rules, as in rule by mortgage creditor of deceased to sell mortgaged property; service of rule sufficient.

Succession of Porter, 5 R. 96; McKeever vs. Keys, 5 R. 61.

1034. Summary Decision—Whenever it is said in this title, that a cause shall be decided in a summary manner, the judge shall pronounce upon it with the greatest practicable celerity, giving it a preference over all other petitions to which the law has not afforded the privilege of a summary process.

C. P. 754, 757, 1028; Caldwell vs. Glenn, 6 R. 9.

1035. Term of Parish Courts—The parish judges of the several parishes shall hold a regular term of their several courts every two months, except in the parish of Jefferson, the parish judge of which parish shall hold his court open daily, legal holidays only excepted, for the trial of all classes of causes of which they may have jurisdiction. Judges of said courts shall have the right to fix the months and days of commencement in which said courts shall sit,

and to change the time from one month to another, when in their judgment the public interest may require it.

The parish courts of the several parishes shall hold a term of court each month, and shall fix the day of commencement thereof corresponding with the day of the commencement of the court in the preceding month in which said court does not hold a term, for the trial of all causes of which it may have jurisdiction, for the trial of probate causes, and the disposition of such probate business as require to be done in open court.

(*Inoperative.*)

Constitution, Art. 80, Act 1890, No. 7.

1036. No Jury in Probate Courts—All causes tried before a court of probate shall be decided without the intervention of a jury, even if the parties should wish for one.

No jury allowed:

1. In probate court.

Devall vs. Succession of Watterson, 18 A. 136.

2. In oppositions to *proces verbal* of deliberations of creditors.

Gulon vs. Creditors, 19 A. 81.

1037. Powers of Probate Courts—Courts of probate have power to issue orders of arrest, attachments, sequestration, writs of distringas, provisional seizure, execution and injunction, in all cases where they may be necessary and proper; to compel the attendance of witnesses; to issue commissions for taking their depositions; to appoint experts, auditors, arbitrators; to compel parties or other individuals to produce title deeds, papers, or other objects which may be in their possession; to punish contempts of their authority, as other judges may; and, in short, to exercise all such other powers not enumerated in this title as may be necessary to enforce their jurisdiction, and they also have other powers specially granted them by law.

C. P. 131 *et seq.*, 210, 239, 248, 269, 280, 296, 425, 441, 471, 641, 917, 918.

Probate court has power :

1. To sequester papers belonging to succession.

Cordes vs. Clarke, 1 R. 271.

2. To determine question of title arising collaterally and the examination of which is necessary.

Babin vs. Nolan, 4 R. 279; 5 N. S. 217; 6 N. S. 296; 8 N. S. 465; 12 L. 218; 17 L. 249.

1038. Calling Creditors Together—Courts of probate may call meetings of the creditors of such successions as are administered under their authority, when the curators or executors, or other administrators of successions, think such meetings necessary to ascertain the wish of the creditors with regard to the manner of selling the property.

C. P. 1054.

Courts may but need not call creditors together.

Succession of Stone, 31 A. 314.

1039. Homologation of Deliberations—Courts of probate may homologate the deliberations of such creditors in the same manner as is done in cases of bankruptcy, and may pronounce summarily on such opposition as shall be made.

C. P. 1034.

1. Homologation of deliberations of creditors essential, else sale null.

NiJa vs. Fontenot, 2 A. 782.

2. Opposition tried summarily and without jury.

Gulon vs. Gulon, 19 A. 62.

1040. Adopting Rules—Courts of probate may adopt such rules of proceeding as they may think proper in cases not provided for by the present title, provided they be not incompatible with what is here contained.

1041. Can Not Issue Habeas Corpus, Mandamus, etc.—

But judges of probate can not, as such, grant writs of *habeas corpus*, or issue any of the mandates mentioned in the tenth chapter of the first title of this second part.

C. P. 791, 792, 796, 878.

1042. Testimony of Witnesses—The testimony of witnesses in causes before the courts of probate shall be taken in writing, and annexed to the record, and a list shall be made of such documents as are produced by the parties, and are not annexed to the record, that they may be read on the appeal.

O. P. 601, 602, 1129.

1. Where on the homologation of an account, opposed or not opposed, evidence is not taken down, case will be remanded. Succession of Dorville, 27 A. 181; Succession of Ross, 21 A. 511; Thompson vs. Benjamin, 16 L. 197; Graham's Heirs vs. Graham's Administrator, 16 L. 201; DeArmas vs. DeArmas, 17 L. 115; Succession of Reeves, 3 A. 554; Fargoud vs. Breard, 4 A. 517; Succession of Larve, 6 A. 529; Succession of Bellocq, 28 A. 153; Succession of Olney, 2 A. 528.

But in ordinary cases, the principle is well settled that the Supreme Court will presume that the judgment of the lower court was based on sufficient evidence.

Graham vs. Rice, 23 A. 393; Simmons vs. Howard, 33 A. 504; Smith vs. New Orleans, 24 A. 20; Johnson vs. Spearling, 15 L. 32; Cooley vs. Broad, 29 A. 75.

2. Appellant should see that record contains all the evidence on which case was tried.

Magloire vs. Barbin, 25 A. 667.

And party to suit should instruct clerk to take evidence in writing.

Bowman vs. Janes, 6 L. 124.

3. The above required depositions of witnesses can not be used subsequently when attendance of the witnesses can be procured.

Pinnell vs. Scriber, 1 R. 3; 6 N. S. 353; 5 L. 356.

1043. Appeals, New Trials, etc.—The rules relative to exceptions to the judge's opinions on such points of law as are submitted to him, to the mode of demanding and granting a new trial, of signing the final judgment, of appealing from it, giving security on such appeal, taking a copy of the record and filing it in the appellate court, and of citing the appellee, are in those cases where the appeal lies directly to the Supreme Court, the same as are provided for the district court.

O. P. 487, 546, 557, 564, 576, 585.

1044. Pleadings and Orders—All the rules concerning pleadings and orders which are required to be in English only, before the other tribunals, as provided in the first title of this part, shall prevail also in the courts of probate.

C. P. 172, 179.

1045. Duty of Clerks—The clerks of the courts of probate, in parishes where there are no registers, and the register of wills for the parish of Orleans, shall keep two records in the same form as is directed for clerks of the district courts of the State.

C. P. 775; R. S. 466, 474, 598.

1046. Duty of Register of Wills—The register of wills of New Orleans shall, under the direction of the judge, make the inventories and sales of succession property, which are directed by law to be made by the courts of probate, independently of such duties as they have to perform in common with other clerks.

1047. Duty of Sheriffs—The sheriffs of the different parishes shall execute all the orders, judgments and decrees rendered by the court of probate in their respective parishes, and shall receive the same emoluments as are allowed them in the district courts.

C. P. 760.

1048. Attendance by Sheriff or Deputy—The sheriff shall also attend or send one of their deputies or constables to the courts of probate which shall be held in their parishes.

C. P. 920.

1049. Appeals Direct to Supreme Court—Appeals shall be carried from the courts of probate directly to the Supreme Court, in all probate matters when the amount in dispute shall exceed five hundred dollars, exclusive of interest.

C. P. 570, 874, 1051; see Art. 874 and 875 and notes.

1050-1053 OF PROCEEDING IN COURTS OF PROBATE.

1050. Appeals—Removal of Tutors—The appeal shall be taken in the same manner from judgments confirming or removing a tutor or curator of a minor, interdicted or absent person, or a vacant estate or absent heirs, when the value of the succession property shall exceed the sum of five hundred dollars, exclusive of interest.

C. P. 580, 576, 1059; see C. P. 574 and notes.

1051. Appeal to District Courts—When the object in dispute or the property of the succession does not amount to five hundred dollars, but exceeds one hundred, exclusive of interest, the appeal from the courts of probate shall be carried to the district court, within the jurisdiction of which the court of probate is held.

The district court shall proceed in the same manner as is prescribed by this Code in relation to appeals from the parish to the district court.

C. P. 569, 1049.

1052. From Probate Courts in Orleans—There shall be no appeal from the decisions of the court of probate for the parish of Orleans, where the object in dispute does not exceed five hundred dollars.

1053. Payment of Privileged Claims—When a judgment shall be rendered for a sum of money against a curator to a vacant succession or absent heirs, or against a testamentary executor or other administrator, such administrator shall, within three days after the judgment has been notified to him, if he has a sufficient amount in his hands, discharge the amount of the judgment, if it be for a privileged debt, such as funeral or law charges, or others of that kind, which are to be paid in preference to all others, before the expiration of three months, within which curators of the estates and

testamentary executors are bound to make payment of the debts due by the estate which they administer.

C. P. 987.

1054. Payment of Ordinary Claims—But if it be for an ordinary debt, the curator, testamentary executor, or other administrator, can not be compelled to pay the amount of such judgment, until after the expiration of the three months allowed him to discharge the debts of the succession, and if the time be expired, he shall pay the amount of such judgment concurrently with the other debts of the succession, by applying to the judge of probate, who appointed him for a convocation of the creditors in the manner prescribed by law, that he may distribute among them the sums which may be in his possession.

C. P. 998, 1088, 1039.

Claims against an estate must be paid by tableau of distribution simultaneously with other creditors.

State ex rel. Gausson vs. Judge, 21 A. 44.

1055. When No Funds Exist, etc—But if the curator, executor, or administrator has no funds in his hands, he shall inform the sheriff, when the judgment is notified to him, that he has not sufficient funds to satisfy it.

See *Stephens vs. Stephens*, 18 A. 416; *Succession of Philbrick*, 18 A. 220; *Christian vs. Lassiter*, 28 A. 576; *Lockhart vs. Wall*, 14 A. 273; *Maraist vs. Gullbeau*, 30 A. 1091; *Ford vs. Kittridge*, 28 A. 113.

1056. Rule on Curator or Executor—The party obtaining the judgment may, thereupon, make a motion to the court that the curator or executor shall be compelled to prove the truth of his declaration, by filing in court, within a time to be specified, a brief statement of his condition as administrator or executor with regard to the said succession.

1057. Execution Against Curator, Executor, or Ad-

Administrator—If the curator, testamentary executor or administrator, refuses or neglects to pay the amount for which judgment has been rendered, in one of the modes pointed out in the preceding articles, or if he fails to prove that he has no funds in his hands belonging to the succession, the party in whose favor the judgment was rendered, may take out an execution against him, under which his property, to a sufficient amount to pay the debt, shall be seized and sold.

C. P. 993, 994; 6 E. 68; 4 A. 496; 18 A. 363; 15 A. 551; 30 A. 394; 4 A. 505.

Where administrator makes a vague and insufficient answer to a rule taken by creditors whose claims have been fixed by a final judgment upon the administrator's account, an execution will issue against him personally.

Succession of Philbrick, 18 A. 220; Stephens vs. Stephens, 18 A. 418.

1058. Distringas—If the judgment direct that something shall be given or delivered, or that something shall be done or refrained from, the party in whose favor it is rendered, may, on the curator, executor, or administrator failing to satisfy it within three days after it is notified to him, and when the judgment shall have acquired the force of *res judicata*, obtain an order to distrain the property of such administrator, until he complies with the judgment.

C. P. 636.

1059. No Suspensive Appeal—When—When an appeal is made from a judgment appointing or removing a tutor or curator of a minor, interdicted or absent person, or of a vacant succession or absent heirs, or other administrators of successions, such appeal shall not suspend the execution of the judgment, but it shall have effect provisionally, until the appeal be decided.

C. P. 580, 1060.

TITLE IV.

OF PROCEEDINGS BEFORE JUSTICES OF THE PEACE.

CHAPTER I.

OF THE JURISDICTION OF JUSTICES OF THE PEACE IN CIVIL MATTERS.

1060. Justices of the Peace—Jurisdiction—Justices of the peace have jurisdiction both in civil and criminal matters. It is their civil jurisdiction which is treated of in the present title.

1. City courts of New Orleans.

See Acts 45 and 67 of 1880; Act 22 of 1888; State ex rel. Freret vs. Judge, 42 A. 78; State ex rel. Carl vs. Judge, 87 A. 880; State ex rel. Fredricks vs. Judge, 88 A. 146; State ex rel. Rothang vs. Judge, 84 A. 1143.

2. Justices subject to supervisory jurisdiction of Supreme Court.

Art. 90, Constitution; State ex rel. Montague vs. Coquillon, 85 A. 1101.

3. Where court held. Can not be held in any building where liquors are sold.

Act 9 of 1890.

4. Action lies for damages against justice acting beyond jurisdiction from arbitrary, malicious or oppressive motives.

Estopinal vs. Peyroux, 87 A. 497; Maquin vs. Hughes, 13 A. 281; Buquet vs. Watkins, 1 L. 181; Bore vs. Bush, 6 N. S. 1.

5. Justice has no jurisdiction to enforce penalties for violation of parochial ordinances by criminal proceedings inaugurated by affidavit and arrest.

Long vs. Justice, 44 A. 949; Board of Health vs. Justice, 45 A.; 84 A. 646; Parish of St. Landry vs. Block, 45 A. 1090.

1061. Original Jurisdiction—Justices of the peace have an exclusive original jurisdiction in all civil cases hereafter expressed.

Constitution 1879, Arts. 126, 126.

Justice has jurisdiction to enforce performance of road duty.

Act 112 of 1880; 42 A. 1190.

1062-1066 JURISDICTION OF JUSTICES OF THE PEACE.

1062. Civil Jurisdiction—With regard to the civil jurisdiction of justices of the peace, three things are to be considered:

1. The value of the object in dispute;
2. The nature of the case submitted to them;
3. The domicile of the defendant.

1063. Jurisdiction—Extent—Justices of the peace may pronounce judgment:

1. On all claims for sums of money, by whatever right they are claimed, whether as debts, damages, fines or taxes;

2. On all claims for the restitution of movable property;

But in neither case have they any jurisdiction, when the value in dispute exceeds the sum fixed in the two following articles.

C. P. 111.

1064. Not Exceeding \$100—Justices of the peace, throughout the State, have cognizance of all cases of the nature of those described above, where the matter in dispute does not exceed the sum of one hundred dollars, exclusive of interest.

See Constitution 1879, Arts. 126, 126, 135; *Fredricks vs. Judge*, 33 A. 149.

1065. May Employ Sheriff—Justices of the peace in the parish of Orleans, and throughout this State, are authorized to employ either the sheriff or his deputy to execute all orders, citations, summons, seizures, and writs. as well in criminal as in civil cases.

Constitution, Art. 135.

Justice may employ sheriff when constable is sick or unable to act.

Act 110 of 1888, p. 174.

1066. Parish Courts—Parish courts have concurrent jurisdiction with the justices of the peace in all cases

when the amount in controversy is more than twenty-five dollars and less than one hundred dollars, exclusive of interest.

(Inoperative.)

1067. Amount in Dispute—Test—To ascertain the amount in dispute before justices of the peace, regard must be had to the demand, without considering interest and charges which may enlarge the sum.

See *Tests of Jurisdiction*, C. P. 675, *ante*.

1068. Jurisdiction—Immovables—Justices of the peace have no jurisdiction when the right of property or the possession of an immovable is called in question, although the amount of the demand may not exceed the sum of which they are allowed to take cognizance.

1. Justices have no jurisdiction where right of property in or possession of an immovable is called in question except in relation to landlord and tenant.

State ex rel. Rothang vs. Voorhies, 34 A. 1142; *State ex rel. Lewis vs. Judge*, 35 A. 1110; *Huyghe vs. Brinkman*, 34 A. 1179; *State ex rel. Fredricks vs. Judge*, 33 A. 146; *State ex rel. Bulsson vs. Judge*, 33 A. 419; *State ex rel. Rutherford vs. Judge*, 15 A. 660.

2. And justice or city court has jurisdiction in suit for rent or possession brought by heir of deceased lessor to whom the property had fallen as his portion.

State ex rel. LeBlanc vs. Judge, 41 A. 964.

3. Lessee can not raise question of title.

Phelps vs. Taylor, 23 A. 596; 8 R. 213; 10 A. 622; 6 R. 139; 2 R. 461; 17 A. 154.

1069. Territorial Jurisdiction—In civil cases within their competence, justices of the peace can only cite before them such persons as are domiciliated or residing within the limits of their jurisdiction, or strangers who may chance to be there.

In this case the term strangers applies to such as have no domicile, or fixed place of residence in the State; pro-

1070-1071 JURISDICTION OF JUSTICES OF THE PEACE.

vided, that courts may issue their commission to any magistrate of the parish, wherein a witness shall reside, to examine such witness and receive his deposition.

C. P. 165, No. 2.

(A) Justices can not cite before them persons not residing within limits of their jurisdiction.

Thus police jury can not be sued before any justice, not even before him within whose ward police jury meets.

Berthaud vs. Police Jury, 7 R. 550; but see *contra* Police Jury vs. Judge, 41 A. 408.

(B) Exceptions to rule stated in text:

1. Police jury.

State ex rel. Police Jury vs. Judge, 41 A. 408.

2. Corporation committing trespass resulting in damages.

Act 7 of 1888, p. 7.

(a) Act 7 of 1888 is constitutional.

State ex rel. R. R. Co. vs. Justice, 41 A. 1094.

(b) Rule was otherwise prior to Act 7 of 1888.

State ex rel. R. R. Co. vs. Justice, 89 A. 990.

1070. Territorial Limits—Justices of the peace shall not hold, exercise, or entertain jurisdiction in any civil matter where the defendant does not reside within the limits of his ward. In cases where there is no justice of the peace resident in any ward, where he is absent, or where there exists some legal ground for his recusation, then the nearest justice of the peace to the residence of the defendant may exercise jurisdiction.

1071. No Appeal—When—Justices of the peace decide without appeal, on all demands, within their competence, where the principal of the demand does not exceed ten dollars, exclusive of interest.

On all judgments exceeding this sum, an appeal is allowed to the parish courts, in the manner hereafter provided.

C. P. 1064; Constitution 1879, Art. 111.

1072. When of Kin, Allied, etc.—Recusation—If a justice of the peace before whom an action is brought, is of kin or allied to one of the parties, he may be challenged by the other, and in that case he shall send the cause to be tried by the justice of the peace living nearest to the domicile or usual place of residence of the defendant.

O. P. 287.

CHAPTER II.

OF THE MODE OF TRIAL BEFORE JUSTICES OF THE PEACE.

1073. Pleas Verbal—The claim, the answer, and the other proceedings in causes brought before justices of the peace, are made verbally, and there are no written acts but such as are expressly required by the present title.

C. P. 159.

1074. Justice's Record—To preserve a record of what takes place before them, justices of the peace shall keep a bound book, in which they shall set down in the order of date the different causes which are brought before them, and in this record they shall state:

1. The title of the suit, that is, the names of the plaintiff and defendant;
2. The object and the amount of the demand, if it be a sum of money which is claimed;
3. The date of the citation and the service of it;
4. The answer of the defendant, if he appears, and his non-appearance, if he makes default;
5. The names of the witnesses produced by both parties;
6. The date of the judgment and its substance, which shall be written in full;
7. The date of the appeal, if one has been taken.

Justice's record controls where its entries are disputed.

State ex rel. R. R. Co. vs. Justice, 43 A. 178; 40 A. 125; *State ex rel. Regan vs. Judge*, 86 A. 977.

1075. Forms Not Essential—The formalities required above in the mode of keeping the record are not indispensable, and their omission does not nullify the proceedings.

1076. Copy of Record—But when such record is regularly kept, a copy of it certified by the justice shall be admitted in evidence on the appeal, with respect to the facts which are declared in it.

1077. Entries in Record—When a suit is instituted before a justice of the peace, he shall make a note in his record, of the date and nature of the demand, and shall immediately prepare a citation setting forth the amount and nature of the demand, to call the defendant before him to answer said demand, and he shall deliver the said citation to any constable of the parish, that it may be served on the defendant.

1078. Citation—Service—The constable to whom the citation is delivered shall serve it on the defendant by delivering said citation to him, or by leaving it at his usual place of residence, with a person of the house, who shall appear to be fourteen years old.

1079. Service on Mariner—If the defendant be a mariner, or person employed on board a ship or other vessel, and has no other known place of residence but said ship, the constable may serve the citation by delivering it to him in person, or by leaving it on board with some person of the crew whom he shall judge to be above the age of fourteen years.

1080. Return of Service—The constable, after serving the citation on the defendant, shall return in writing to the justice the date and manner of the service, and the justice shall make an exact statement of it in his record.

C. P. 200, 201.

1081. Constable Witness—When—If any dispute arise concerning the fact of such service, or its date, the constable shall be a competent witness.

1082. Answer—When—The defendant thus cited, shall only be obliged to appear and answer to the action, the day after the service of the citation, if he reside or happens to be in the city or precincts of New Orleans, or within ten days after such service, in other parts of the State.

State ex rel. Montague vs. Coquillon, 35 A. 1102.

C. P. 1082 is amended by *Act 16 of 1894* so as to give defendant in Orleans three days, and in country ten days, to answer.

1083. Recording Answer—When the defendant appears, the justice shall record his answer, and if he declines the jurisdiction or pleads compensation, mention shall be made of such pleas.

1084. Trial—Continuance—If both parties are ready to try the cause, the judge may proceed to the hearing, otherwise the justice shall fix such a day and hour as he thinks proper, allowing sufficient time to the parties to summon their witnesses, if it be necessary.

1085. Trial—Waiting—Non-Suit—Judgment—If, at the time fixed for the hearing of the cause, one of the parties fails to appear, the justice, after the lapse of an hour, if the party reside in town, or after waiting an hour longer if they reside in the country, shall discharge the defendant with costs, if it be the plaintiff who makes default; and if it be the defendant, the justice shall proceed to hear the plaintiff's testimony, and if he find the claim to be well founded, he shall grant a judgment by default against the defendant, which may be carried into execution three days after being notified to him.

1086-1089 TRIAL BEFORE JUSTICES OF THE PEACE.

- 1. Justice must wait two hours when defendant resides in the country.**

State ex rel. Montague vs. Coquillon, 35 A. 1102.

- 2. Prior default not necessary.**

State ex rel. R. R. Co. vs. Justice, 42 A. 177.

- 3. And when plaintiff fails to appear only proper judgment is non-suit where there is no reconventional demand. Judgment for specific sum for costs is improper.**

State ex rel. Henderson vs. Justice, 40 A. 21; 30 A. 237; 3 A. 639; 4 A. 176; 15 A. 299; C. P. 686.

1086. Hearing Cause—If the two parties appear at the time appointed, the justice shall immediately proceed to hear them and to render judgment, and in this case the judgment may be executed without being notified.

Judgment can not exceed amount claimed or go beyond petition.

17 A. 65; 22 A. 53; 30 A. 736.

1087. Party, Special Attorney or Lawyer—The parties may appear before the justice either in person, or by a special attorney, or by a lawyer.

1088. Party as Witness—At the time of trial, or before, each party may call on the other to testify, on oath, on the matters in dispute between them, and the justice may receive their declaration in writing, and annex it to the record, after having caused it to be signed by the party attesting, or his mark made, if he can not write.

O. P. 347.

1089. Plea to Jurisdiction—Appraisement—If the suit be in revendication of a movable object, and the defendant pleads to the jurisdiction of the justice of the peace, on the ground that the thing claimed is beyond the value of which he has cognizance, the judge shall cause it to be appraised by two persons selected by the parties and sworn by him, who shall make their appraisement in

writing, and according to such appraisement the justice shall determine whether he be competent or not. If one of the parties refuse to name an appraiser, the justice shall appoint one for him, and shall also appoint an umpire if the two first can not agree in the appraisement.

1090. Appeal—The party considering himself injured by the judgment may appeal from it, on declaring such his intention to the justice, without presenting any petition, and the justice shall note the time of such appeal, and take from the appellant such security as the case requires.

1091. Compensation—If the defendant has pleaded compensation, the justice shall admit the plea, if the amount pleaded be a liquidated sum, or can be proved without retarding the decision of the cause; and if, under this plea, the defendant is only indebted for a balance, the justice shall give judgment for such balance only, and the defendant shall pay the costs, unless he had offered to pay such balance.

1092. Compensation—Costs—But if the defendant, on pleading compensation, has offered to pay the balance which he considers due, by depositing it in the hands of the justice, the defendant shall only pay costs up to the time of such offer, and the plaintiff shall bear the expenses subsequently incurred.

Plea of compensation:

1. What may be pleaded in compensation:

- (a) Acknowledged account, note, bond or judgment, even when devolutively appealed from.

Sandel vs. George, 18 A. 526.

- (b) But not when appeal is suspensive.

Kernian vs. Hills, 12 R. 576; Benton vs. Roberts, 2 A. 243.

2. What may not be pleaded in compensation:

(a) Claims for services rendered when no amount was agreed upon.

Berens vs. Ker, 28 A. 96.

(b) A mere moral obligation.

Fowler's Succession, 27 A. 212.

3. Plea special.

Ruhiman vs. Smith, 15 A. 670.

4. Effect of plea. It admits correctness of plaintiff's demand.

Ashley vs. Sholars, 22 A. 442; Normand vs. Edwards, 23 A. 42.

1093. Compensation—Reconvention—Balance—If the compensation pleaded exceeds the demand, the justice, if he considers the plea to be rightly made, shall render judgment in favor of the defendant, if he prays it for the excess of the debt pleaded in compensation over that on which the demand was founded, and the plaintiff shall pay the costs.

1094. Prior Tender—If it be proved to the justice that before the commencement of the suit the defendant has offered to the plaintiff, in the presence of a credible witness, to pay the sum or thing claimed by him, the justice, in pronouncing judgment in favor of the plaintiff, shall sentence him to pay the costs, and shall allow him no interest, except such as had accrued before the offer.

1. Effect of plea of tender:

Plea of tender admits plaintiff's right of action *pro tanto*.

Davis vs. Millaudon, 17 A. 97.

2. Inconsistency with other pleas: Plea of tender inconsistent with—

(a) General issue.

Davis vs. Millaudon, 14 A. 838.

(b) Prescription.

Whitworth vs. Ferguson, 18 A. 602; Ins. Co. vs. Pike, 34 A. 825.

1095. Costs—Except in the cases where offers have been made, as provided above, the party cast shall always pay the costs, although the judgment be for a smaller sum than was claimed.

O. P. 549, 552.

CHAPTER III.

OF ORDERS WHICH JUSTICES OF THE PEACE MAY MAKE
IN SUITS COMMENCED BEFORE THEM.

1096. Conservatory Writ—In causes within their jurisdiction, justices may issue orders of arrest, injunction, attachment, sequestration and provisional seizure, according to the rules hereafter provided.

D. P. 209.

(A) Writs may issue on Sundays.

Act 96 of 1890, p. 115.

(B) Injunction.

1. Writ may issue in all proper cases within jurisdiction of justice.

Gonzales vs. Tax Collector, 80 A. 1085.

2. Writ will not issue:

(a) When act is already accomplished.

26 A. 604; 81 A. 105.

(b) When threatened act will not cause irreparable injury, and an injury is not irreparable which can be compensated by damages.

Crescent City Live Stock vs. Police Jury, 82 A. 1192.

Or which merely entails delay, increased labor and expense.

Cole vs. Judge, 29 A. 808.

1097. Arrest—Every creditor for an amount within the jurisdiction of a justice of the peace, may have his debtor arrested and compel him to give security to appear, if the debtor is about to depart from the State, or from the parish where he has his domicile, or if he has no domicile in the State.

C. P. 210.

1098. Arrest—Mode of Securing—The creditor wishing to arrest his debtor shall make his demand before any

competent justice of the peace, to have the debtor cited and condemned to pay the sum due, and that he be at the same time required to give security to appear and answer the said demand.

1099. Oath—Contents—But this arrest shall only be ordered by the justice, on the creditor making an affidavit that the defendant is really indebted to him in the sum demanded, stating such sum precisely; and such affidavit shall also state that the creditor really believes that his debtor is about to depart from the State or parish of his domicile, before judgment can be obtained against him, and that such debtor does not, to his knowledge, possess any property in the State to satisfy the demand.

1100. Oath, Contents, etc.—When the demand shall be brought against a person having no domicile in the State, the creditor may have him arrested and held to bail, by declaring in his affidavit that such creditor has no domicile in the State, without being obliged to declare that he is about to depart, but in other respects taking the same oath as required in the preceding article.

Provided, that no citizen of another State shall hereafter be arrested in this State, at the suit of a resident or non-resident creditor, except in cases where it shall be made appear, by the oath of the creditor, that the debtor has absconded from his residence.

C. P. 212.

1101. Writ of Arrest—The justice to whom this prayer for arrest shall be made, accompanied by a suitable affidavit, shall deliver to a constable a citation and order of arrest, and bring before him the said defendant, that he may answer to the action brought against him.

C. P. 217.

1102. Execution—The constable charged to execute

this order shall arrest the defendant on delivering to him the citation of which he is in possession, and shall take him before the justice of the peace who caused him to be cited, if the said justice be at his office.

1103. Bond for Appearance—The justice shall require from the defendant his bond in double the sum demanded, with one good and solvent surety conditioned for his appearance on the trial of the cause.

1104. Failing Bond, Imprisonment—If the defendant will not or can not give the security required of him, the justice shall send him to prison, there to remain until he gives the security demanded; or shall be discharged from imprisonment in the manner provided by law.

1105. Bond Taken—By Constable—When—If the constable who has arrested the defendant does not find the justice at his office, he may take from the defendant the security for appearance required above, or in default thereof conduct him to prison, by virtue of the order which he has received.

1106. Duty of Jailor—Compensation—It shall be the duty of the jailor of the parish whither the defendant shall have been carried, to receive and keep him until set at liberty by order of the said justice; and for the support of the defendant while in prison, the plaintiff shall pay to such jailor, weekly and in advance, the sum of three dollars and fifty cents.

1107. Sum to be Advanced by Plaintiff—The justice of the peace to whom the plaintiff shall apply for the arrest of his debtor shall require from him such sum as ought to be advanced to the jailor on delivering the debtor into his custody; and in all civil actions brought before them, justices of the peace may demand security for the costs.

1108. Bond by Debtor—Conditions—The bond to be furnished by the debtor under arrest shall contain a condition that if he should depart without permission from the justice who caused him to be arrested, or should fail to appear to satisfy such judgment as may be rendered against him, his security shall be bound to satisfy such judgment, to the amount of his bond.

C. P. 219 *et seq.*

Confession of judgment will not authorize release from imprisonment.

State ex rel. Williamson vs. Judge, 37 A. 383; Anderson vs. Brinkley, 1 A. 126; State ex rel. Wung Chung vs. Sheriff, 51 A. 799.

1109. Debt Not Yet Due—Even when the debt owing from a person about to depart from the State is not yet due, the creditor may, if the debt be one of which a justice of the peace has cognizance, apply to any competent justice, and procure the arrest of his debtor to compel him to give security for his appearance when the debt becomes due.

1110. Affidavit When Debt Not Due—But to obtain such order of arrest, the creditor must make an affidavit, in which he shall declare that the person whom he wishes to arrest is really indebted to him in a sum which he shall specify and which is not yet due, and that he is informed and verily believes that such debtor means to depart permanently from the State for the purpose of defrauding his creditors, and without leaving any property, as far as he can learn, to satisfy them.

C. P. 217.

1111. Bond by Debtor—In case of such arrest, the person thus brought before a justice of the peace shall be set at liberty, if he furnishes to the justice his bond in double the amount in which he is indebted, with one good and sufficient security, conditioned that he will surrender him-

self on such judgment as may be pronounced on the debt when it becomes due, or that his security shall pay it for him; otherwise the justice shall imprison such debtor until he furnish the security or pay the debt.

1112. Rights of Surety—A person who shall have become security for another, in a cause depending before a justice of the peace, may at any stage of the cause, provided it be before judgment, release himself from all responsibility on that account, by giving up the person of the debtor to the justice who took the bond, and who shall then imprison the debtor, unless he give new bail.

1113. Right to Arrest Principal—The bail who wishes to give up the debtor's person, may, if the debtor refuses to come voluntarily, or wishes to leave the State or the jurisdiction of the justice, without his consent, apply to the judge who took his bond, to have the debtor arrested, as provided above.

1114. Judgment Against Surety—If the bail does not produce the body of the debtor in execution of the final judgment which has been obtained against him, the plaintiff may apply to the justice who issued the execution, if the constable has made a return, stating that he has found no property of the debtor, and obtain judgment against the surety for so much as is covered by his bond, and no more.

1115. No Arrest of Minors—Married Women—When—No order of arrest or imprisonment can be obtained in civil suits commenced against minors, unless they make a business of buying and selling merchandise; or against a woman in any civil case.

C. P. 211.

1116. Attachment—Grounds—A person who is creditor

for a sum within the cognizance of a justice of the peace, may attach the property of his debtor, in the three following cases:

1. If his debtor resides out of the State;
2. If the debtor is about permanently to depart from the State;
3. If the debtor be only transiently in the State and have no domicile in it, or so conceals himself that process of law can not be served on him.

C. P. 240.

This article amended by Act 105 of Ex. Ses. 1877.

1117. Affidavit—A creditor who wishes to obtain an order from a justice for attaching his debtor's property, shall make an affidavit that such debtor is really indebted to him in a sum which he shall specify, and is in one of the predicaments mentioned in the preceding article, describing such predicament expressly.

C. P. 240.

1118. Bond—Conditions—The creditor shall moreover deliver to the justice his bond in favor of the defendant for double the amount of the demand, with one good and sufficient surety, to answer such damages as the defendant may sustain, in case the attachment should prove to be improperly obtained.

Acts 1871, p. 18.

Bond is now required only to equal the demand.

Act 27 of 1882, p. 42.

1119. Writ—Citation—The justice of the peace to whom such demand and affidavit shall be presented, shall direct to a constable of the parish a citation against the defendant, and an order to attach the movable property which the defendant may have in the parish, wherever it may be found, even in the hands of third persons, as well as such debts as may be owing to him, although they are not yet due.

1120. Service of Citation — Modes — The constable charged with the execution of this order, shall begin by serving on the defendant the citation, which is issued in the same manner as in ordinary cases, if such defendant has domicile in the place, or if he can be found; but in the contrary case, or if the defendant be absent, the constable shall affix a copy of such citation on the door of the court house of such parish.

Posting writ and citation: When defendant is absent, service is made by posting on court house door.

Connell vs. Medlock, 24 A. 512; *Woolbridge vs. Montouse*, 27 A. 79;
Walker vs. Barell, 32 A. 470.

1121. Seizure Under Writ—The constable shall then proceed, without delay, to seize the movable property which the defendant has in his parish, to the value of the sum due, together with interest and costs, and shall make a list of such property in the presence of a credible witness, which list he shall deliver to the justice issuing the order of seizure, or making his return.

1. Duty of constable to make seizures in order of their receipt by him.

Gomilla vs. Milliken, 41 A. 117.

2. Constable must take actual possession of movables.

Crane vs. McQueen, 23 A. 512.

1122. Attachment of Debts — If the defendant's property consists in debts owing to him, the constable shall attach and stop them in the hands of the debtor, after receiving his declaration of the amount due by him and the time when it is to be paid, and shall make his report of it to the justice, as above directed.

See *ante*, Attachment, Garnishment, C. P. 240.

Attachment—garnishment:

Property need not be taken out of garnishee's hands.

Dennistown vs. New York, 6 A. 782; *Dwight vs. Mason*, 12 A. 846;
Cox vs. Bradley, 15 A. 580.

1123. Refusal of Garnishee to Answer—If such debtor refuses to declare what he owes to the defendant, the plaintiff may have him cited before the justice of the peace to compel him to make such declaration under oath to the justice, and if he refuses to make such declaration or fails to appear, such refusal shall be considered as an acknowledgment that he is indebted to the defendant in a sufficient sum to discharge the demand, and judgment shall be rendered against him in favor of the plaintiff.

U. P. 246 and notes.

1124. Sequestration—If a claim be made before a justice of the peace for a specific object or any movable of a value within his jurisdiction, the plaintiff may require that such object shall be sequestered until judgment be had, if he make his affidavit that he verily fears that the defendant means to remove such object out of the said justice's jurisdiction.

C. P. 275.

Duty of sheriff sequestering:

1. If he seize bill of exchange he should present it for acceptance or payment.

Parish vs. Hozey, 17 L. 578.

2. For his compensation he is entitled to make reasonable charges to be determined by the judge.

Parkison vs. Boyle, 7 R. 82; Witkowski vs. Witkowski. 16 A. 251.

Act 2 of 1894 amends C. P. 1124 to read as follows: "Justice of the peace shall have authority to issue writs of sequestration in the following cases:

- (a) "If a claim be made for a specific object or any movable of a value within his jurisdiction.
- (b) "Where the plaintiff has an heir or privilege on property of a value within his jurisdiction.
- (c) "In all cases within his jurisdiction when one party fears that the other will conceal, part with, or dispose of the movable in his possession during the pendency of the suit.

"Provided, a plaintiff wishing to obtain an order of sequestration in any one of the cases above provided, must annex to the petition in which he prays for such an order, an affidavit setting forth the cause for which he claims such order; he must, besides, execute his obligation in favor of the defendant for such sum as the justice of the peace shall determine, with the surety of one good and solvent person, residing within the jurisdiction of the court, to be responsible for such damages as the defendant may sustain, in case such sequestration shall have been wrongfully obtained."

1125. Provisional Seizure—If a demand be made for a sum due for rent within the jurisdiction of a justice of the peace, the plaintiff may demand that the furniture of the house subject to the rent be seized provisionally, if he make an affidavit that he is afraid of the defendant removing it from the house to deprive him of the pledge which he has on it.

C. P. 284.

1. Exemptions set forth in C. P. 644 do not apply to lessees.
Stewart vs. Lacoume, 80 A. 157.

2. Bonding writ.
Act 19 of 1877, p. 22.

3. Provisional seizure by laborer.
Act 25 of 1874, p. 59.

1126. Oath by Agent—When—Whenever a plaintiff wishes to obtain an order of seizure, attachment, sequestration, injunction, or provisional seizure, before a justice of the peace, the agent or attorney of such plaintiff may be allowed to make the necessary oath; provided such oath be founded on his own knowledge, and not on information derived from his principal.

C. P. 289; 80 A. 1085; 28 A. 208.

1127. Bonding Seizures—But the defendant whose property shall have been seized, attached, sequestered, or

1128-1129 APPEALS FROM JUDGMENTS BY JUSTICES.

provisionally seized, shall obtain a restoration of such property if he give to the justice of the peace his bond with one good security in double the amount demanded. to satisfy such judgment as shall be rendered against him, with interest and costs.

C. P. 279, 289; Act 19 of 1877.

CHAPTER IV.

OF APPEALS FROM JUDGMENTS RENDERED BY JUSTICES OF THE PEACE.

1128. Appeal—When—Appeals from the judgments rendered by justices of the peace, throughout the State, where the value of the object in dispute exceeds the sum of ten dollars, exclusive of interest, are brought before the parish judge of the parish where such justices exercise their functions, except in the parish of Orleans, where appeals from justices of the peace are brought before the Third District Court.

R. S. 58; *Freret vs. King*, 42 A. 78.

Judgment must be signed.

Marshall vs. Hooker, 27 A. 454.

Except where judgment is interlocutory.

Theriot vs. Michel, 28 A. 107.

1129. Trial De Novo—All appeals from judgments rendered by justices of the peace shall be tried in the appellate courts *de novo*; and it shall be sufficient for the party desiring to take an appeal to declare verbally such intention.

R. S. 38, 589; C. P. 601, 1135, 1136; Constitution 1879, Arts. 123, 136; *Sanders vs. Ingram*, 5 N. S. 647.

(A) Appeals direct to Supreme Court:

Appeal lies direct to Supreme Court in all cases in which the constitutionality or legality of any tax, toll or impost whatever, or of any fine, forfeiture or penalty imposed by a municipal corporation, shall be in contestation, whatever may be the amount.

Constitution 1879, Art. 81; 27 A. 158; 30 A. 415; 30 A. 915; 30 A. 1244; 31 A. 535; 31 A. 544.

APPEALS FROM JUDGMENTS BY JUSTICES. 1130-1132

(B) Facts can not be considered except to determine the issue on which the appeal is taken.

Municipality vs. Blanc, 1 A. 385; Hennen's Digest, p. 89, No. 2.

1130. Statement of Facts—But the party themselves may agree on a statement of facts, which the justice shall transmit to the appellate court, after having caused it to be signed by the parties, or their marks affixed, if they can not write, and certified to under his own signature.

R. S. 38, 589.

1131. Suspensive Appeal—No appeal from a judgment before a justice of the peace shall stay execution, unless the said appeal be taken three days after the judgment, if it has been pronounced in the presence of the parties, or within three days after the notification of it, if it has been rendered in the absence or on default of one of the parties, and unless the appellant shall execute his bond in the appellee's favor, with one good and sufficient security, for double the amount of such judgment, conditioned that he shall pay such sum as shall be awarded against him on the appeal.

R. S. 58; Act 103 of 1882; 29 A. 223; 12 R. 421.

Act 129 of 1888 amends Art. 1131 so as to—

- (a) Extend its provisions to city courts.
- (b) Require suspensive appeal bond to exceed by one-half the amount of the judgment.
- (c) Add to said article: "Judgments shall not be final until action by the court upon any motion for a new trial which may have been made within the delay now authorized by law or rule of court."

1132. Devolutive Appeal—If the appellant will not or can not give such security, the justice of the peace shall allow him to appeal, if he give security in a sum to be fixed by said justice, sufficient to pay the costs, but in this case the appeal shall not stay execution.

1133. Prescription of Appeal—If a party having cause to complain of a judgment rendered by a justice of the peace, allows twelve months to elapse after the time allowed for an appeal, without having taken one, he shall no longer be allowed to appeal, but the judgment shall acquire the force of *res judicata*; provided no appeal shall be allowed from any judgment rendered by a justice of the peace in the parish of Orleans, after the expiration of ten judicial days from the signing of the judgment and its notification to the party cast.

C. P. 698; Constitution 1879, Art. 135.

1134. Citation—A justice of the peace, after receiving the appeal and security of the appellant, as above provided, shall issue a citation to the appellee, directing him to appear before the appellate court within three days after service of the said citation by a constable, if he reside in the place, or allowing one more day for every ten miles between the place of rendering the judgment and that of the appellee's residence.

1. Requirement of citation is not essential when appeal is to Supreme Court under Art. 81 of Constitution and when motion for appeal was made day judgment was signed, in open court and in presence of opposing counsel.

Andrus vs. Board of Police, 41 A. 693.

2. But in other cases citation is essential.

Mayor of Carrollton vs. Gaillard, 17 A. 120.

1135. Transcript—The justice of the peace shall also transmit, without delay, to the office of the appellate court an exact copy, certified by him, and also of his judgment, together with the statement of facts, if any has been agreed on by the parties, and of the citation which he has issued to appellee.

C. P. 1129; 80 A. 1092.

1136. Trial on Appeal—The appellate court may de-

cide according to the statement of facts and the documents submitted to it, in the absence of any other proof offered by the party; but the parties are at liberty to produce the same witnesses who were examined below, and the court may hear any new testimony.

R. S. 88, 589; C. P. 1129, 1180, 1185.

1137. Remanding for Execution—The appellate judge, whether he reverses or confirms the judgment, shall remand it for execution to the justice below; and if such justice should be dead, absent, or no longer in office, he shall direct another justice of the peace to cause the said judgment to be executed.

1138. Judgment on Appeal—Frivolous Appeal—Damages—When the appellate court reverses the judgment, it shall render such a one as the justice of the peace should have rendered, and sentence the party failing on the appeal to pay costs; and the appellate court may, in its discretion, when the appeal has been taken from a judgment, sentence the party appealing to pay not more than ten per cent. as damages on the amount of the judgment appealed from, over and above any interest said judgment may bear, if it shall appear that said appeal was frivolous taken for delay.

C. P. 907; R. S. 89, 590.

1. Appeal in possession suits by landlords must be heard summarily.

R. S. 2155-56; State ex rel. Matt vs. Judge, 87 A. 844.

And may be heard in vacation.

Id.

2. No damages for frivolous appeal when appeal is devolutive only.

See other instances C. P. 907; Chaffe vs. Carroll, 85 A. 115; Crofts vs. Moynihan, 26 A. 727.

CHAPTER V.

OF THE EXECUTION OF JUDGMENTS RENDERED BY JUSTICES OF THE PEACE.

1139. Execution of Judgments—Three days after a judgment has been rendered by a justice of the peace, if it was in the presence of the parties, or reckoning from the notification of it, if it was rendered in the absence or on default of one of them, the justice of the peace shall, if required by the party in whose favor it was rendered, or if no appeal has been taken, or such an appeal only as does not stay the execution, issue an order to seize the property of the debtor to an amount sufficient to satisfy the judgment, together with interest and costs; provided it shall be lawful for any judgment creditor, entitled to execution, to issue several writs of *feri facias* to different parishes at the same time, subject to the provisions of special laws.

1. Notification to defendant not present at trial is essential even when personally served.

Act 24 of 1876 amending C. P. 575 inapplicable; *State ex rel. Hesse vs. Justice*, 40 A. 21.

2. Justice of the peace and city courts are governed peculiarly by the provisions of Code of Practice under the title "Justices of the Peace," which prevail in cases of conflict.
See Act 7 of 1888; *R. R. Co. vs. Hufft*, 39 A. 990.

3. *Who executes writ*: Act 110 of 1888 (1890), p. 174, authorizes justice of the peace to employ sheriff to execute judgments when constable is unable to do so by reason of relationship, sickness, etc.

4. Movable seized first unless there be privilege or mortgage. But defendant failing to point out movables can not complain.

Nobles vs. Nettles, 3 R. 152; *Denville vs. Hayes*, 23 A. 530; *Hefner vs. Hesse*, 29 A. 149.

5. Damages recoverable for premature execution.
Durbridge vs. Wentzel, 17 A. 20.

6. *Against whom writ issues:* Writ issues only against cast party to suit, not third person.

Shelley vs. Dobbins, 31 A. 530.

7. *What property should be first seized:*

Only property free from incumbrance and within the parish.

Dinkgrave vs. Sloan, 13 A. 393; *Morris vs. Womble*, 30 A. 1313;

Todd vs. Gordy, 29 A. 498.

8. Where sheriff acts without malice, he is liable only for value of property taken and sold.

Macias vs. Sheriff, 43 A. 289.

9. *Remedy of third person whose property is seized:* He may have it released by making affidavit, etc.

Act 37 of 1882, p. 49.

1140. Exemptions—The constable directed to execute this order shall proceed to seize the movable property of the debtor if he finds any in his parish to a sufficient amount to satisfy the execution; and he shall give notice of its sale within ten days at the customary places, in situations where no newspapers are published, or in at least one public paper in places where any are printed, according to law.

The constable can not seize the clothes and bedding in the use of the debtor and family, nor his arms and military accoutrements, nor the implements and tools of the trade whereby he gains a living, nor the rights of personal servitudes, of use and habitation, of usufruct to the estate of a minor child, nor the income of dotal property, nor the agricultural implements and working cattle, separately from the land to which they are attached, nor the corn, fodder, hay, provisions and other supplies necessary for carrying on the plantation to which they are attached, for the current year, nor the defendant's homestead, under the provision of special laws.

R. 8. 572, 645, 2838, C. P. 644, 645, 647; Act 79 of 1876; Constitution 1879, Art. 219; Act 62 of 1877; Act 114 of 1880; Act 63 of 1874.

1141. Safe Keeping of Movables—In the interval be-

tween the seizure and sale, the constable shall take into his possession and deposit in a safe place, the movable property thus seized, unless the debtor execute a bond with one sufficient surety in double the amount of the judgment, conditioned that the said property shall be forthcoming on the day of sale.

C. P. 656.

1. Actual seizure and possession by constable necessary when feasible.

15 A. 379; 18 A. 56; 19 A. 58; 22 A. 207; 24 A. 262; 27 A. 120; 30 A. 188.

2. Sheriff must keep seized property safely.

Whitton vs. Jones, 2 A. 802.

1142. Keeper—When—Charges—In no case can the constable appoint a keeper to preserve the property seized, unless with a written consent of the debtor, and in this case he can not charge more than fifty cents a day for the costs of such keeping.

C. P. 657.

1143. Sale by Constable—The constable shall make sale of the property at public auction, on the day fixed by the advertisement, at the office of the justice of the peace nearest the residence of the party whose property is seized, or at the most public place within three miles thereof, to be designated by the justice of the peace issuing the order of sale, except in towns, in which sales shall be made at the place where the sheriff is in the habit of making sales of property under execution; provided, that in all cases the defendant shall have the right to have the sale made at his own place of residence within said parish; and provided, that this provision shall not apply to the parish of Orleans.

R. S. 591, 634, 8406.

Advertisement.

Act 49 of 1877, p. 62; Act 25 of 1878.

EXECUTION OF JUDGMENTS BY JUSTICES. 1144-1147

1144. Seizure of Immovables—If the constable find no movable, he shall seize immovable property.

R. S. 640.

1145. Appraisement—All property seized under writs of justices of the peace, whether the same be movable or immovable, shall be appraised and sold in the same manner as property seized and sold by sheriffs.

R. S. 686; McNeill vs. Kramer, 27 A. 680.

Justice can not appoint appraiser in behalf of defendant.

Gallagher vs. Abadie, 26 A. 843.

1146. Reduction of Seizure—When—When the property of any defendant in execution shall be under seizure in different parishes at the same time, such defendant shall have the right to have a reduction of the seizures which shall have been so made, upon showing that the amount of property so seized is more than sufficient to satisfy his creditor's judgment; provided, that such seizing creditor shall be liable to pay the defendant in execution such damages as the latter may have sustained in consequence of any excessive seizures made at his instance.

Heffner vs. Hesse, 29 A. 149; Gusman vs. DePoret, 33 A. 333.

1147. Return on Writs—It shall be the duty of constables, the parish of Orleans excepted, to return forthwith every process to them directed, together with their proceeding thereon, to the justice issuing the same, except writs of *feri facias*, which shall be returned within thirty days from the date thereof.

R. S. 635.

1. Seizure after expiration of writ illegal.

Johnson vs. Wall, 1 N. S. 541; Dugat vs. Babin, 8 N. S. 593.

2. Alias *f. fa.* necessary when original expires. A writing by justice "This *f. fa.* renewed" is insufficient.

McNeill vs. Kramer, 27 A. 673.

1148. Seizure in Other Parishes—If, after a judgment has been rendered against a debtor by a justice of the peace in the parish where he resides, he removes to another parish, the justice of the peace may direct an order to a constable or sheriff of the parish to which he has removed, to seize and sell his movable or immovable property, as the case may require; and it shall be the duty of such sheriff or constable to execute his order, and to make his return in the same manner as if it had been directed to him by one of the justices of his own parish.

1149. Remanding for Execution—The judgment on appeal from the decisions of a justice of the peace in the parish of Orleans, shall be sent back to the said justice to be executed.

1150. Imprisonment—When—When the creditor, who has obtained a judgment, finds neither movables nor immovables belonging to his debtor, he may, as soon as the constable has returned that he finds no property to seize, obtain an order to imprison the debtor, upon making affidavit that he has reason to believe said debtor is possessed of property or assets which may be made available to his creditors upon complying with special laws.

O. P. 726, 731.

1151. Release from Imprisonment—The debtor may obtain his enlargement by declaring on oath that he has no movables or immovables to satisfy said judgment, except such as are exempt from seizure by law.

CHAPTER VI.

OF THE POWERS GRANTED TO JUSTICES OF THE PEACE FOR THE PERFORMANCE OF THEIR DUTIES.

1152. Necessary Powers—Justices of the peace possess all such powers as are necessary to exercise the jurisdiction.

tion conferred on them, in cases where no express provision has been made by this Code.

Gonzales vs. Lindsay, 80 A. 1086; Weber vs. Skinner, 82 A. 1098.

1153. Witnesses—Attachment—Fine—Justices of the peace may summon and compel the appearance of witnesses in causes brought before them, and if the witnesses do not attend, the justices may arrest and fine them, provided the fine does not exceed ten dollars, for the benefit of the parish, for each failure in this respect; and if the witnesses appear and refuse to answer the questions put to them, they shall be imprisoned as guilty of a contempt of court, for a time not to exceed that specified in the next article.

1154. Contempts—Justices of the peace may punish a contempt of their authority by an imprisonment not exceeding twenty-four hours.

1155. Commissions to Examine Witnesses—They may grant commission to take the testimony of witnesses in cases depending before them, when such witnesses reside out of the parish.

They have power to appoint curators *ad lites*, to enable minors to present their claims before the justice of the peace, when the amount claimed shall not exceed one hundred dollars; provided, there be neither natural nor legal tutor to the minor, and it be made to appear, by proper affidavit, that the minors are transient persons following some trade or occupation, and are without parents in this State.

They shall also have such other powers as are conferred by special laws.

R. S. 2550, 8858; O. P. 425, 431, 432, 433; Act 7 of 1877, p. 10.

Execution of commission.

See Ferriber vs. Latting, 9 A. 169; Blair vs. Collins, 15 A. 683; Flower vs. Downs, 12 R. 101; Caballero vs. Maduel, 26 A. 112.

CHAPTER VII.

OF CONSTABLES AND THEIR DUTIES.

1156. Constables—There shall be one constable for each justice's court in the parish of Orleans, who shall hold his office for the term of two years.

He shall be elected by the qualified voters residing within the sectional limits within which each justice is required to hold his court. They shall give bond with one or more good and solvent sureties, in the sum of five thousand dollars, conditioned for the faithful performance of their duties and for the legal adjustment of all claims against them, incurred in their official capacity, which bond may be sued upon by any person damaged in any way by the constables in the discharge of their official duties.

R. S. 642.

1157. Constables—Election—Term—Bond—Oath—In the country parishes one constable shall be elected for each justice of the peace, for the term of two years, by the qualified electors of the justice's ward. He shall reside in the ward for which he shall have been elected.

Before entering on the discharge of their duties they shall take the oath prescribed by the Constitution, and give bond in the sum of five hundred dollars, with security to be approved according to law.

R. S. 681, 682.

1158. Vacancies—How Filled—Should any vacancy occur in the office of constable, except in the parish of Orleans, by failure to elect or otherwise, the president of the police jury shall forthwith order an election for the residue of such term, by giving a written notice, at least ten days previous to the election, which shall be posted

up by the sheriff of the parish at the place of voting in the ward; provided, that the justices of this State, without the limits of New Orleans, shall have power to appoint constables *pro tempore*, whenever there shall be no such officer elected for their respective districts in the manner directed by law.

1159. Bond—New One—When—No justice of the peace for the city and precincts of New Orleans shall employ any constable to execute his orders in civil matters, without having in his possession an authentic copy of the security which such constable has given, and if it appear to him on examination of said copy, that the persons given as security have left the parish or become bankrupt, he shall acquaint the Governor of the fact, who shall thereupon require new securities from the said constable, and in default of his giving the same shall appoint another.

1160. Constables—Extent of Power—Constables, except in the parish of Orleans, shall have authority to act throughout the extent of their respective parishes, and they shall execute all orders, decrees and judgments which judges and justices of the peace may direct to them.

1. Possession of constable is that of the law, and he may appeal when deprived of his possession.

State vs. Judge, 15 A. 24; *Succession of Caldwell*, 8 A. 43; 6 R. 102.

2. He can not act beyond limits of his ward.

State vs. Boiteaux, 31 A. 128.

3. Constable may employ force to execute writs.

Winn vs. Elgee, 6 R. 102.

4. Constable is liable to owner of property for value thereof when he allows it to be taken.

State vs. Cassidy, 7 A. 274; *Crane vs. Quinn*, 23 A. 512; *Dosson vs. Bellier*, 10 A. 570.

Or where he fails to take care of property.

Barrimore vs. McFeely, 32 A. 1179.

1161. Removal—Constables may be removed by the parish judge, on complaint made against them, if he finds that they have been guilty of misconduct, malversation or gross neglect, after giving them notice of the complaint, and hearing their defence; the parish judge shall also cause them to deliver up their commission, and imprison them if they refuse, and until they comply.

Removal of constables.

See Arts. 196 to 201 Constitution of 1879.

(Signed) MORTIMER CARR,
Speaker of the House of Representatives.

(Signed) OSCAR J. DUNN,
Lieutenant Governor and President of the Senate.

Approved, March 14, 1870.

(Signed) H. C. WARMOTH,
Governor of the State of Louisiana.

A true copy:

GEO. E. BOVER,
Secretary of State.

APPENDIX.

Art. 15. Interest in Action or Pleas.—

One who had been the third possessor of property sold by an administrator to satisfy a mortgage due the succession, is without interest to question whether the adjudicatee at the sale paid the price, when it appears that he (third possessor) was without interest in the distribution of the proceeds of sale. *Derouen vs. Hebert et als.*, 46 A. 1388.

The defendant in a petitory action **SUED AS POSSESSOR** of the property, **THE TITLE TO WHICH IS ALLEGED TO BE IN ANOTHER**, is without interest to except to the petition. *Beland et al. vs. Gebelin et al.*, 46 A. 326.

The only departure from the principle laid down in C. P., Art. 15, is in the instance mentioned in R. C. C. 3057, where a surety is under certain circumstances permitted to sue his principal, even before making any payment. *Derouen et als. vs. Norris, etc.*, 49 A. 1181.

Defendants were sued by **GEORGE W. TAYLOR**, under a contract they had with **W. R. TAYLOR, AGENT**. Held, that defendants were without interest to inquire into the relations of the plaintiffs, *inter se*, so long as they were not deprived of any defense. *Taylor vs. Alman-da Bros.*, 50 A. 351.

A taxpayer of a municipal corporation has standing in court to attack a compromise between the corporation and its debtor when the result of the compromise would reduce the sum to be paid the municipality. *The City Item, etc., Co. vs. City of New Orleans*, 51 A. 713.

The father of a minor son has no right of action in himself to sue for the nullity of the son's marriage, where the nullity charged is relative and not absolute. Until the marriage is dissolved, the son is a minor emancipated by marriage. *Delpit et al. vs. Young*, 51 A. 973.

At the expiration of the period for respite, the stay order ceases to be operative and creditors may proceed individually and need not collectively force a *cessio bonorum*. *Kelley, etc., Co. vs. Fluker et al.*, 51 A. 193.

Art. 21. No Abatement of Action.—

The right of action for damages given to certain survivors under R. C. C. 2315, abates at the death of the survivors there named, though the cause had been instituted, tried and submitted to the court (but not decided) when the plaintiff died. *Cheevers vs. Roger*, 51 A. 57.

Art. 43. Petitory Action.—

In a petitory action, the defendant reconvened claiming OWNERSHIP IN HIMSELF. Subsequently he discontinued his reconventional demand. Held, that the suit was not thereby changed from the petitory to the possessory action. *Heirs of Brigot vs. Brigot*, 49 A. 1429.

Where plaintiff in a petitory action prays to be declared the OWNER OF THE PROPERTY AND FOR POSSESSION thereof, a decree giving him POSSESSION ONLY is incorrect, as the REJECTION OF THE CLAIM FOR OWNERSHIP left him without right to possession. *Byrne vs. Robert*, 51 A. 548.

Art. 44. Plaintiff Must Make Title.—

Plaintiff in a petitory action must recover on the strength of his own title, he can not avail himself of defects in that of defendant's. *Landry vs. Landry*, 45 A. 1113; *Willet vs. Andrews*, 51 A. 436. Nor those in that of a third person. *Foret et als. vs. McConnell, Jr.*, 46 A. 215. And his suit will be defeated, where the outstanding title of the third person is better than plaintiff's. *Rowson vs. Barbe*, 51 A. 347. Where, however, the defendant urges as the defect in plaintiff's title one standing in the name of a third person, AND THE PLAINTIFF PRODUCES TITLE FROM THAT THIRD PERSON, plaintiff's title will stand until set aside by the party entitled to have it annulled. *Adolph vs. Richardson*, 52 A. 1156; *West vs. Negrotto*, *ibid.* 381; *Bernard vs. Smith*, 45 A. 1136; *Scott vs. Briscoe*, 37 A. 178.

In a petitory action where plaintiffs fail to show a sufficient title, judgment should be as of non-suit. Defendant's plea of prescription will not avail to give them title, NOR DID THEY PRAY FOR IT. *Willet vs. Andrews et al.*, 51 A. 436. Where plaintiffs fail to show a sufficient title, the case falls, before consideration of the defense began. *Rowson vs. Barbe*, 51 A. 347.

If in an action of jactitation, the defendant, instead of avowing & denying the slander, avers that his title is better than that of plaintiff, the character of the suit is changed to a petitory action, and the defendant assumes the burden of a plaintiff in such an action. *McConnell vs. Ory et al.*, 46 A. 564.

Art. 46. Possessory Action.—

To a petition in a possessory action, there was annexed a deed to the property—i. e., the right of way for a railroad—FOR THE SOLE PURPOSE OF SHOWING POSSESSION and its character. Held, that the action was not thereby changed into a petitory action. *Hermitage, etc. vs. Higginson*, 46 A. 425.

Art. 49. Requisites of Possessory Action.—

Plaintiff in a possessory action must show that his CIVIL was preceded by CORPOREAL POSSESSION—either by himself or THE ACTORS

OF HIS TITLE—and that he brought his suit WITHIN THE YEAR in which the disturbance took place. *Taylor vs. Telle*, 45 A. 124.

Civil possession at the time of the disturbance, when preceded by actual possession, suffices to maintain the action unless the civil possession "is usurped by another during the time required by law, or there be no possession for ten years." *Handlin vs. Weston Lumber Co.*, 47 A. 401.

Art. 64. When Creditor has no Executory Title.—

Where the heir has been put in possession, the creditor of the ancestor can not seize the property inherited by the heir, without first obtaining judgment against the heir. One against the ancestor will not suffice. *Hart vs. Connolly*, 49 A. 1587.

Art. 68. Hypothecary Action Against Third Person.—

In a hypothecary action against persons who have acquired property affected with a mortgage resulting from the inscription of a judgment, the proper decree should be either to give up the property or pay the amount for which it stands hypothecated. *Wolfe vs. Joubert et al.*, 45 A. 1100.

Art. 102. Who May Sue.—

The owner of an undivided interest in real property may maintain a petitory action against a mere possessor without title, without joining the owner of the remainder, and may recover possession of the whole. *Mays vs. Wilkowski*, 46 A. 1475.

The plaintiff had a contract with the defendant, to plant a crop of rice on shares. Subsequent to the formation of the contract, and without the knowledge of defendant, the plaintiff took a partner. Held, that the latter was not a necessary party to the suit. *Torian vs. Weeks*, 46 A. 1503.

Where Partnership Exists, It Must Sue.

Where the petition avers a claim of an existing partnership, and the suit is brought by the partners as individuals, it will be dismissed. So long as the partnership exists, its claims must be asserted in the partnership name. *B. J. Wolf & Sons vs. New Orleans, etc., Co. et als.*, 52 A. 1357.

Who May be Joined as Defendants.

Where two or more persons are liable *in solido*, they may be sued at the same time and in the same action. *Planters' Oil Mill vs. Monroe Waterworks and Light Co. et als.*, 52 A. 1243.

Art. 106. Husband's Authorization or that of Court necessary.—

Plaintiff suing the wife, and making the husband a party defendant, authorize his wife, will not be heard to deny the authority of the

wife to move for the dissolution of a writ of attachment issued in the proceedings, where the husband has joined the wife in other proceedings in the same suit. *Lehman, Stern & Co. vs. Broussard et al.*, 51 A. 346.

The mere recital in the petition of married women that they are joined and assisted by their husbands is not equivalent to AUTHORIZATION by them. *Hayes et als. vs. Dugas et als.*, 51 A. 447.

The minor wife sued by the minor husband to have the marriage declared a nullity, does not need a tutor, or curator, nor the authorization of the husband or court to defend the suit. *Delpit et als. vs. Young*, 51 A. 923.

Art. 108. Suits for Minors, etc.—

When the father has abandoned the marital domicile, the mother may appear in court and assert the rights of her minor children. *Williams vs. Pope Mfg. Co.*, 52 A. 1417.

Art. 109. Suits by Tutors, etc.—

The widow as such and as tutrix of her minor child are properly joined as plaintiffs in a suit for damages resulting from the death of the husband and father. *Helm, etc., vs. O'Rourke*, 46 A. 178.

The wife deserted by her husband may in the same action sue for damages accruing to herself and her minor child out of the same cause of action. *Williams vs. Pope Mfg. Co.*, 51 A. 185.

Art. 110. Minor Husband.—

The father of a minor son has no right of action in himself to sue for the nullity of the son's marriage where the nullity charged is relative and not absolute—until the marriage is dissolved, the son is a minor emancipated by marriage. *Delpit et al. vs. Young*, 51 A. 923. Nor does the minor wife need a tutor or curator, nor the authorization of the husband or court to defend such a suit. *Id.*

Art. 112. Corporations Act Through Officers.—

Where to a petition of opposition to the discharge of an insolvent on the ground of fraud, etc., filed by a corporation, there is annexed the affidavit of its vice president—an exception will not lie to the authority of the affiant to bind the petitioning corporation. *Lacaze & Reine vs. Creditors*, 46 A. 237.

Art. 113. Suits by Heirs.—

Each heir may sue for the recovery of his undivided portion of property inherited by him and which had been alienated during his minority. There is no obligation to make the other heirs parties. *LeBleu et al. vs. North American, etc., Co.*, 46 A. 1465.

Art. 116. Curator Ad Hoc of Unrepresented Minor or Absentee.—

In a suit for the partition of immovables the heirs themselves must be cited, and absent or minor heirs must be represented by a curator *ad hoc*. The attorney for absent heirs can not represent the absentees in a proceeding for partition. *Gibbs vs. Executor, etc.*, 47 A. 766.

Plaintiff died pending an appeal by a defendant, the latter moved to appoint the father of plaintiff's minor heirs, curator *ad hoc* to represent them in the suit. Held, that the appointment was valid. *Heirs of Kemp*, 49 A. 1650.

In a suit to compel a vendee to take title, the plaintiff widow may have the absent heirs of the husband represented by a curator *ad hoc* and contradictorily with him, show that she acquired the property with her separate paraphernal funds. The proceeding is *in rem* and absentees may be thus cited without attachment of the property. *Bartels, vs. Souchon*, 48 A. 783.

The court to which application is made by a resident of another State for executory process, has jurisdiction to issue its writ enjoining the seizure and to appoint a curator *ad hoc* to represent the absent defendant in injunction. *Phillips et al. vs. Adams Mach. Co.*, 52 A. 442.

See annotation to Art. 165.

Art. 123. Suits Against Testamentary Executors Alone or with Heirs—

See annotation to Art. 116.

Art. 126. Jurisdiction of Courts (*ratione materiae*).—

When the Constitution provides that jurisdiction *ratione materiae* is fixed "exclusive of interest," the interest accrued to the date of suit will not be considered. *Bruno vs. Oviatt*, 48 A. 471, distinguished; *State ex rel. City vs. Judge*, 49 A. 249.

Ibid (page 126). Conflict of Privilege Resulting from Writs in Several Suits—

See annotation to Art. 1063.

Art. 130. Judges Have Necessary Powers Without Special Grant—

Where a judgment probating a will and putting in possession is attacked within three months, it is within the discretion of the judge—having jurisdiction—to order *ex-officio* the sequestration of the property and order an inventory, and if the sequestration is set aside, an appeal will lie from the decree. *Schwan et als. vs. Schwan et als.*, 52 A. 1183; *Eltringham vs. Clark et al.*, 49 A. 340.

Art. 131. Contempt of Court—

(To amend and re-enact Art. 131 of the Code of Practice, relative to the power of Courts to punish for contempt.)

Whereas, Art. 166 of the Constitution of this State ordains and provides that the power of courts to punish for contempt shall be limited by law; therefore,

SECTION 1. *Be it enacted by the General Assembly of the State of Louisiana*, That article one hundred and thirty-one (131) of the Code of Practice be amended and re-enacted to read as follows:

Article 131. The Judges of the Supreme Court, Courts of Appeal and District Courts have the power to punish all contempt of their authority by fine not exceeding fifty dollars and imprisonment for a period not exceeding ten days for each offense of that kind; and provided that no publication out of court, respecting the conduct of such District Courts or its officers, jurors, witness or parties in any cause pending in court shall be construed to be a contempt, and punished as such, reserving to the parties aggrieved their remedies by prosecution for libel or action for damages.

SEC. 2. *Be it further enacted, etc.*, That all laws or parts of laws conflicting with this act, or contrary to its provisions, be and the same are hereby repealed. (As amended by Act 190, 1894, p. 242).

See State ex rel. Phelps & Baker vs. Judge, 45 A. 1350, decided before this act was passed.

(Act 189, 1898, 435—To carry into effect Art. 177 of the Constitution and to limit the power of courts to punish contempt of court).

SECTION 1. *Be it enacted by the General Assembly of the State of Louisiana*, That failure to obey an order or judgment of court, when such order or judgment is in effect an order or judgment for the payment of money, shall not be construed as a contempt if it appears that the failure to obey is due to inability to comply with the order or judgment, which inability existed when the order or judgment was rendered.

SEC. 2. *Be it further enacted*, That all laws or parts of laws conflicting with this act, or contrary to its provisions, be and the same are hereby repealed.

A creditor residing in Louisiana intervened in certain proceedings pending in the United States Circuit Court between his debtor and another. Subsequent to the filing of the intervention, the debtor made a cession of his property, and the usual order staying all proceedings was issued. To protect his rights against another—a foreign creditor who intervened in the suit in the U. S. Circuit Court, the resident creditor continued his intervention. Held, that there was no contempt of the stay order, as the action of the resident creditor was necessary to protect his rights. *Calder and Co. vs. Creditors*, 45 A. 761.

It is not imprisonment for debt, but contempt of court, for the manager of a corporation to refuse to obey an order of court ordering him to deliver to a receiver appointed by the court the money in his possession. State ex rel. Audebert vs. Sheriff, 47 A. 334.

A person conducting a business forbidden by the court for a number of days, can not be punished for contempt for each day he has so con-

ducted it. The entire term constitutes a single offense. *State ex rel. Schoenhausen vs. Judge*, 47 A. 701; *State ex rel. Garvey et al. vs. Whitaker et al.*, 48 A. 527.

Contempt proceedings can not be resorted to to compel the debtor in execution to produce the key and open an iron safe, particularly when a valid seizure can be made without resort to process for contempt. *State ex rel. Anglade vs. Judge*, 48 A. 1414.

The court may punish the husband for contempt when he refused to obey the order directing him to pay alimony. *State ex rel. Huber vs. King, Judge, et als.*, 49 A. 1503. (NOTE.—There must be financial ability. See Act 189, 1898, printed, *supra*.)

An executor refusing to comply with an order of court ordering him to turn over funds of the succession to the heirs, may be repeatedly punished for contempt under one proceeding to the full limit allowed by the article. Articles 131 and 308 are laws in *pari materia* and must be construed together. *Heffner et als. vs. Judge*, 50 A. 554.

See Annotation to Art. 308—*Certiorari* will lie to review penalty imposed for contempt of injunction.

See Annotation to Art. 791—*Habeas corpus* will not lie in contempt proceedings.

See Annotation to Art. 830—When *mandamus* will lie to review contempt proceedings.

Art. 151. Cumulation Permitted—When.

It is not improper for the plaintiff to cumulate in one suit a claim for wages as overseer, value of crops disposed of, and supplies, money and teams furnished and board of laborers. *Torian vs. Weeks*, 46 A. 1503.

The revocatory action and that *en déclaration de simulation* may be cumulated if it be done by distinct alternative allegations, otherwise they will be held inconsistent. *Harrison & Bro. vs. Soulabere*, 52 A. 707.

Art. 152. Inconsistency.—

There is no inconsistency in pleading want of consideration and compensation in the alternative. *Phillips et al. vs. Adams Mach. Co.*, 52 A. 442.

Art. 156. Demand for Less than is Due.

Where defendant in partition is ordered to collate a larger sum than that claimed, though the evidence authorizing the judgment was filed year before its rendition giving plaintiff ample time to amend, he will be allowed on appeal the amount claimed, and the case being re-
manded, to amend by claiming the additional amount awarded. *Wafford vs. Wafford*, 10 A. 636.

A vendee stands as plaintiff towards his vendor cited in warranty, and is governed by C. P. 156, and is concluded by the prayer of his call in warranty; *Vascon vs. Pavie*, 14 L. 135. See also *French vs. Landis*, 12 R. 635; *Fourie vs. Petout*, 2 M. 83; *Harty vs. Harty*, 2 L. 519; *State Bank vs. Navigation Company*, 3 A. 294; *Elliot vs. Labarre*, 5 L. 225; *Sears vs. Wilson*, 5 A. 689.

A *dation en paiement* having been set aside at the suit of the husband's creditor, the husband after judgment claimed the constitutional exemption. Held, the claim was too late, it should have been set up in the alternative in the answer. *Babenau et al. vs. Guilbeau et al.*, 53 A. 992.

Art. 157. Costs are due by Party Cast in Suit.—

Party pays costs when cast upon any issue. *Holzap vs. Railroad Co.*, 38 A. 185; *McCarthy vs. Boze*, 26 A. 382; *State ex rel. Gondrian vs. Judge*, 48 A. 455; *Bartels vs. Souchon, id.*, 783.

In forming the *concurso* plaintiff should deposit the amount at the time acknowledged to be due. Otherwise costs and interests will be adjudged against him, though the amount he failed to deposit was small as compared with the amount deposited. *Louisiana Molasses Co. vs. Le Sassier et als.*, 52 A. 2070.

Where a plaintiff succeeds in her demand even in part against both of two defendants, the latter owe costs *in solido*. *Lamotte vs. Martin*, 52 A. 864.

See annotation to Art. 549, 908.

Art. 158. Premature Demand.—

An exception of prematurity is not waived nor merged in the answer by consent to have it referred to the merits, particularly where the exception is reserved in the answer. *Murray et al. vs. Spencer et al.*, 46 A. 452.

Where a suit is brought before the maturity of the note sued upon, it will be dismissed, if an absolute and unconditional judgment is prayed for. *Egan vs. Fush*, 46 A. 474; *Hewitt vs. Williams*, 47 A. 72.

The insolvency of the principal does not mature the debts against the surety, and a suit against him, and an attachment of his property instituted before the debt is due, will be dissolved on the plea of prematurity. *State National Bank vs. N. O. Brewing Association et als.*, 49 A. 935.

Art. 160. No Prescribed Forms.—

See annotation to Art. 172.

Art. 163. Actions to Revendicate Real Property, to Enforce Mortgages or Liens on Movables.—

"In action of revendication of real property, or where proceedings are instituted, in order to obtain the seizure and the sale of real property

in virtue of an act of hypothecation importing confession of judgment, and in actions brought to enforce a legal or judicial mortgage against a third possessor, and in actions against a third possessor to enforce a special mortgage, and in all cases of provisional seizure or sequestration the defendant may be cited, whether in the first instance or in appeal, either within the jurisdiction where the property reventicated, hypothecated or provisionally seized or sequestered is situated or found, though he has his domicile or residence out of that jurisdiction, or in that where the defendant has his domicile, as the plaintiff chooses; *provided*, that all judgment rendered in such cases shall only be operative up to the value of the property proceeded against, and not binding for any excess over the value of the property *in personam* against the defendant." (As amended by Act 64, 1876, p. 106.)

Art. 165. Exceptions to Rule of Domicile.—

"There are other exceptions to this rule which require that the defendant be sued before the judge having jurisdiction over the place of domicile or residence; they are here enumerated:

1st. In matters relative to the partition of real property between several co-proprietors, for in such a case the suit must be brought before the court of the place where such property is situated, though the co-proprietors may reside in different parishes.

2d. In matters relative to partnership, as long as the partnership continues, in all suits concerning it, the parties must be cited to appear before the tribunal of the place where it is established, or if there are several establishments, before that of the place where the obligation was entered into.

3rd. In matters relative to failure, all the suits already commenced, or which may be subsequently instituted against the debtor, must be carried before the court in which the failure has been declared.

4th. In matters relative to warranty, they must be carried before the court having cognizance of the principal action in which demands in warranty arise.

5th. When the defendants are foreigners, or have no known place of residence in the State, they may be cited where they are found.

6th. When the defendants are joint obligors they may be cited at the domicile of any one of them.

7th. In suits to enforce the collection of bonds of State and parish officers the courts of the parish in which the officers exercise the duties of their offices shall have jurisdiction over the securities; it matters not in what parish they may reside.

8th. In action of trespass on real estate, and all matters relating to real servitudes, be they natural or conventional, the judge of the place where the property is situated, shall have cognizance of the cases.

9th. In all cases where any corporation shall commit trespass, or do anything for which an action for damages lies, it shall be liable to be sued in the parish where such damage is done, or trespass committed.

10th. In all suits on a policy of insurance, the defendant may be sued either at the domicile of the insurance company, or in the place where its principal agency is established, or in the parish where the loss occurred, or in the case of life insurance, at the domicile of the deceased, whether it be in a case of fire, marine or life insurance." (As amended by Act 22, 1894, p. 25).

Judicial sureties may be sued in the parish where they assumed the obligation, regardless of their actual domicil. *State ex rel. Gondrian vs. Judge*, 48 A. 455.

A husband sued by the wife for a separation of property in a court other than that of his domicile, may answer there, and a judgment so obtained is not void for want of jurisdiction unless the selection of the forum was the result of an antecedent consent. *Atkins Bros. vs. Scarborough*, 52 A. 801.

5. Foreigners and Those Having Unknown Places of Residence—

A non-resident woman who, authorized by her husband, had obtained a writ of sequestration on the affidavit of an agent, can not be brought into court on a suit for damages growing out of the dissolution of the writ, by service on her husband, who was found in the State. *Crow et al. vs. Sheriff*, 45 A. 1221.

The husband who had authorized and assisted in the sequestration suit was bound with her *in solido*, and being a non-resident, was properly cited where found in the State. *Id.*

Where the defendants in a petitory action are residents of a State other than this, the suit may be filed wherever defendants are found; and a corporation organized under the laws of New Jersey can be brought into the courts of this State by service on the president of the corporation, temporarily within the State. *State vs. Bush and The Plaquemines, etc., Co.*, 46 A. 656.

A foreign corporation may be brought into the courts of this State by personal service on its president temporarily within its borders. *Gravely vs. Ice Machine Co.*, 47 A. 390.

See annotation to No. 9 *infra*.

9. Trespass by Corporations—

Where a railroad company put a passenger off its train a mile beyond the station where he intended to stop, it is a trespass within Sec. 12 of the company's charter, which provides that "in actions of trespass" it may be sued in the parish where it has taken place. *Dave vs. Morgan's, etc., Co.*, 46 A. 273.

Defendant's employee was killed by the bursting of a steampipe in defendant's sugar house. Held, that under the averments of the petition this was a positive act for which suit could be maintained where it was

committed, though the domicile of the defendant was in another parish. *Castille et al. vs. Caffery, etc., Co.*, 48 A. 322; *Breney vs. Same, id.* 408.

A corporation may be sued for trespass wherever it may be found. *Williams vs. Pope Mfg. Co.*, 52 A. 1417.

See annotation to No. 5 *supra*.

ACT No. 23, 1900.—To confer upon Courts of this State jurisdiction over absent defendants; and to provide for the citation and service thereof upon defendants beyond the limits of the State.

SECTION 1. *Be it enacted by the General Assembly of the State of Louisiana*, That whenever any person shall do or transact any business, of any nature whatsoever, in this State, either personally or through an agent or other representative, and a cause of action shall arise or grow out of said business, in favor of any other party, and the person against whom such cause of action shall arise should afterwards leave the State, he may be sued thereon in any Court of the parish in which said business was had or transacted, having jurisdiction as to the amount sued for.

SEC. 2. *Be it further enacted, etc.*, That any suit or action brought or instituted under the provisions of section one of this Act, citation shall issue to the defendant therein in manner and form as now provided by Article No. 179 of the Code of Practicesave that it shall allow thirty days for the delivery of defendant's answer if service can be made upon him within the United States, and sixty days after he be served with citation, if in any foreign country.

SEC. 3. *Be it further enacted, etc.*, That in any suit brought or instituted under the provisions of this Act, service of citation may be made upon the defendant by the delivery to him of the petition and citation by any male person over the age of twenty-one years; the party making such service to make due return of the same to the Court from which the citation issued, which return shall set forth the date and place of service, with the express declaration that it was made by delivering the petition and citation to the defendant in person; the said return to be sworn to before any Notary Public of the State of the Union in which service shall have been made, or before any Minister, Consul, Vice Consul, Charge d'Affaires, or Commercial Agent of the United States, exercising the functions of his office in the foreign country in which such service has been made.

SEC. 4. *Be it further enacted, etc.*, That this act shall take effect from and after its passage.

Art. 264 (Const. 1898): "No domestic or foreign corporations shall do any business in this State without having one or more known places of business and an authorized agent or agents in the State upon whom process may be served."

Legal Process on Foreign Insurance Companies.

See Act 105, 1898, at p. 142, Art. II, Section 1, providing for service on Secretary of State of suits against foreign insurance companies.

Act 21, 1877, p. 24.

AN ACT relative to insurance companies not incorporated by the laws of this State, and requiring them to appoint agents on whom legal process may be served and providing penalties for a violation of the provisions thereof.

SECTION 1. That no insurance company organized under the law of any other State, or any foreign government, shall, directly or indirectly, take risks or transact any business through an agent in this State until such insurance company shall have filed in the office of the Secretary of State a certified copy of the vote or resolution of the trustees, or directors of said company, appointing such agent to transact business and take risks, accompanied by a warrant of appointment under the official seal of the company, and signed by the President and Secretary. Such warrant shall continue valid and irrevocable until another agent shall be substituted, so that at all times, while any liability remains outstanding, there shall be within this State an agent or attorney aforesaid; and such warrant shall not be valid unless it contains a consent expressed that service of legal process, original memo or final on such agent, shall be taken and held as valid as if served on the company, and that acknowledgment of service of such process by him, for or on behalf of such company, shall be obligatory on it, and that judgment recovered on such service or acknowledgment shall be conclusive evidence of the indebtedness of the company.

SEC. 2. That it shall not be lawful for any agent of any insurance company, not incorporated by the laws of this State, to take any risks or transact any business until he has obtained from the Secretary of State a certificate that the provisions of this act have been complied with by the company for which he acts.

SEC. 3. That a duly certified copy of the instruments required by section first to be filed with the Secretary of State shall be received in evidence in lieu of the original.

SEC. 4. That any person who shall, after the first day of April, eighteen hundred and seventy-seven, act as agent of any insurance company, not incorporated by the laws of this State, in taking any risks, or transacting any business, or receiving any premiums on policies issued or to be issued, without an appointment made and filed in accordance with the provisions of this act, shall be deemed guilty of a misdemeanor, and punished with fine or imprisonment, or both, at the discretion of the Court.

Agents of foreign insurance companies are only authorized to be cited and to stand in judgment in our Courts as mandataries of the insurance companies. *State vs. Wood et als.*, 40 A. 177; *State vs. City vs. Insurance Companies et als.*, 43 A. 140.

Art. 167. Where Defendant Changes Domicile—

Where a year has not elapsed since the removal of a party to another parish, and he has not made a formal declaration of his intention to change his domicile, he may be sued in either parish, and if suit be filed in the parish from which he has removed, a curator *ad hoc* may be appointed to represent him. *Ansbacher vs. De Neveue*, 45 A. 969.

Art. 171. Petition—

Difference in the color of the several sheets of paper which formed the petition is not cause for exception. The only requisites are that it be a printed or written document arranged in a consecutive and logical order. *Lukis vs. Allen*, 45 A. 1447.

Where a petition was ACTUALLY DEPOSITED in the clerk's office, and a copy thereof with citation served on the defendant, it will be

TREATED AS FILED, though it was not so endorsed at the time, but later and before pleadings were filed by defendant, it was so endorsed *nunc pro tunc*. *Wheeling Pottery Co. vs. Levy*, 48 A. 777.

Where a document is in fact filed, or by the court ordered to be filed, lack of endorsement evidencing the fact of filing, will not destroy the fact itself. *State ex rel. Dist. Att'y. vs. Judge*, 48 A. 109, 138. (The issue arose in a criminal proceeding, but the rule holds in civil proceedings. See *Wheeling, etc., Co. vs. Levi*, *supra*.)

Exception of no Cause of Action.

"Verbal precision is not exacted, and technicalities are not favored in our system of pleading," and when the allegations, considered as a whole, "present a cause of action, they should be given that effect." *Kellar vs. Victoria Lumber Co.*, 45 A. 476.

An exception that the petition does not give the correct number of the judicial district of the court is without merit. *Clark et al. vs. Comford et al.*, 45 A. 502.

A petition which avers that the secretary of the defendant corporation had declined petitioner's—a stockholder—request to examine the defendant's books, does not disclose a cause of action, because a stockholder can not make his fellow stockholders liable for any damage which the act of the officer has caused the petitioner. *Legendre & Co. vs. Brewery Association*, 45 A. 669.

On the trial of an exception of no cause of action, the facts alleged must be taken as true, provided they are in themselves possible. Their legal consequence is presumed to be denied. *Wolf vs. Stewart*, 48 A. 1431.

The rule that on the trial of an exception of no cause of action, the allegations of the petition are to be taken as true, does not extend to conclusions of law or matters of evidence pleaded in the petition. *Southern, etc., Company vs. Wolf, etc., et al.*, 48 A. 631.

Art. 172. Petition, Prayer, Character of Proceeding—

On a petition alleging the agency of the defendant and praying for an account and judgment for the amount which may thus be shown to be due, it is error to give judgment for any specific sum, where defendant has not filed any account. *Lallie vs. Lallie et al.*, 48 A. 726.

Whatever the averments of the petition, unless the prayer asks for relief by a proper judgment under proper procedure, the suit will be dismissed on the plea of no cause of action. *New Orleans, etc., R. R. Co. vs. Louisiana Construction Co.*, 49 A. 49.

The character of a suit is determined by the substance of the demand, not the mere form of expression used in the petition. *Henricks vs. City*, 50 A. 1244.

The lessee, made defendant in ejectment proceedings, can not change the character thereof by a reconventional demand for damages, the

original proceeding retains its summary character. *Meghill vs. Kelly*, 51 A. 281; and where the lessee sues to prevent the lessor from ejecting him, a reconventional demand by the defendant for ejectment, based on proper notice, etc., will make the entire proceeding summary in its character. *State ex rel. McMahon vs. Judge*, 52 A. 1039.

When plaintiff's petition and the evidence show a legal cause of action, but the decree prayed for is not warranted by either the petition or prayer, the cause will be remanded. *Beugnot vs. Tremoulet*, 52 A. 454.

Art. 175. Oyer.—

The failure to annex documents mentioned in the petition is not cause for dismissal; it suffices if an intelligent cause is set out. The defendant may demand their production, and dismissal will follow the failure to produce. *Hewitt vs. Williams*, 47 A. 742.

Art. 177. Waiver of Service, etc.—

Waiver of citation is not waiver of legal delays, it is to be taken as if service had been made on the day when citation was waived. But the judgment rendered thereon on a default prematurely taken is not absolutely void and can not be attacked collaterally. *Anheuser-Busch, etc., Co. vs. Gowan*, 49 A. 680.

Art. 178. Clerk Must Make Copy and Annex Citation

Where a copy of a petition does not contain the address to the court, it is not a true copy, and since the omission is the fault of the clerk of court, the suit will not be dismissed, plaintiff is entitled to delay for the service of a true copy. The omission of the address was not cured by the accompanying citation which contained the names of the parties to the suit, and the title of the court. *Lukis vs. Allen*, 45 A. 1447.

Art. 179. Essentials of Citation—

A citation addressed TO THE PRESIDENT of a corporation, and served personally on its general agent, is an absolute nullity. *State ex rel. Yazoo, etc., Railroad Company vs. Justice*, 48 A. 1417; *State ex rel. New Iberia, etc., Co. vs. Voorhies, Judge et al.*, 50 A. 671.

A citation addressed to the agent of a person is insufficient. It should be addressed to the principal, and where service is not personal it must be made at his USUAL and not at his LAST place of residence, but whatever the return, if the evidence—not objected to—showed personal service, a judgment would not be void because of the incorrect return. *McFadden vs. Sheriff et al.*, 49 A. 1319.

Art. 198. Service on Corporation, Banks, Partners, etc.—

Where parties are liable *in solido* and each is cited, they are all properly before the court, though the liability arose when the parties

formed a commercial partnership, which had been dissolved by the death of one of the partners before the institution of the suit. *Helm, etc., vs. O'Rourke*, 46 A. 178.

Art. 201. Return of Domiciliary Service—

Return of domiciliary service must show that person—if other than defendant—on whom service was made, resided at the domicile of the defendant, and that service was made at domicile of defendant, his place of business will not answer. *Lehman, Stern & Co. vs. Broussard et al.*, 45 A. 346; and if name of person was not known to officer, then it must show how he ascertained it. *Ibid.*

Art. 206. Citation Essential, Waiver by Appearance

Absentee defendants, without reserving the right to plead any existing informalities in the citation, bonded property which had been attached. Held, an appearance which cured the informality in the service. *Williams et al. vs. Gilkeson-Sloss Co.*, 45 A. 1013.

Where an exception to a defective citation is overruled, and answer filed reserving the exception, it is not such an appearance as waives the defect. In a suit against a parish, a citation addressed to the president of the police jury individually is defective. *State ex rel. Police Jury vs. Judge*, 46 A. 117.

A defect in citation is cured by defendant appearing to bond the property. *Hollingsworth vs. Atkins Brothers*, 46 A. 515.

An exception of no cause of action was filed before exception to the jurisdiction *ratione personæ*. Held, that the latter must necessarily fail. *State vs. Bush and The Plaquemines, etc., Co.*, 46 A. 656.

After appearance and answer, the defendant is yet in court, though he discontinue his reconventional demand. *Heirs of Brigot vs. Brigot*, 49 A. 1429.

When residents of Louisiana voluntarily file a document in a court of another State, declaring they appear therein as defendants in a certain suit, etc., that court will be held to have been seized of jurisdiction over said persons. *National Bank vs. Moore*, 50 A. 1332.

Art. 207. No Citation, Demand or Proceeding Allowed on Days Dies Non—Conservatory Writs May Issue.

“No citation can issue, no demand can be made, no proceedings had, nor suits instituted on Sundays, on the Fourth of July, on the First and Eighth of January, on the Twenty-fifth of December, Twenty-second February, on Good Friday, and moreover in the Parish of Orleans

Mardi-Gras and the Fourth of March, nor shall any arrest be made after sunset on any individual within his domicile, provided, however, that writs of arrest, of attachment, of sequestration, of provisional

seizure and injunction may issue and be executed on Sundays and legal holidays." (As amended by Act 98, 1890, p. 115).

See R. S. 1114, as amended by Act 93, 1892, p. 124, and Act 110, 1896, p. 158, Decoration Day.

Art. 214. Affidavit and Bond—

Act 103, E. S., 1870, p. 18, Acts 1871.

AN ACT relative to bonds taken in cases of arrest, attachment, sequestration and provisional seizure, and to suits against joint obligors.

SECTION 1. That in all cases of arrest, attachment, sequestration and provisional seizure, in which bonds are required to be given by the plaintiff previous to the issuing of the writ, the bond so given shall be made payable to the clerk of the court which issues the writ, and the defendant, as well as every person party to the suit, or injured by the issuing of the said writ, shall have recourse thereon against the principal and securities on the bond for any damage they may sustain in case such writs should have been wrongfully issued, *and in case the plaintiff should cause the writ to issue against certain specified property*, the bond shall inure to the benefit of any and all persons interested in *such property*; *provided*, that this act shall not be so construed as to release the sheriff, in any manner, from the duties, responsibilities and liabilities now devolved upon him by law.

SEC. 2. That hereafter, in all suits against joint obligors, it shall be necessary to make all the obligors parties to the suit, but each of the joint obligors may be sued and judgment obtained against them separately for the proportion of the debt or obligation due by them respectively, whether all are joined in the suit or not.

SEC. 3. That all laws in conflict with the provisions of this act be and the same are hereby repealed, and that this act shall take effect from and after its passage.

Arts. 216, 217. Oath—Applies to all Provisional Writs—

An affidavit for attachment made by an attorney, in the absence of the principal, "from information received, and believed to be true," is a sufficient compliance with law, as would be any other expression equivalent to the words prescribed. *Dinkelspiel's Sons vs. the New Albany Woolen Mills*, 46 A. 576.

When the husband joins the wife in the suit, the authority of the wife to give an injunction bond therein is implied, and his signature to the bond is not necessary; and when the affidavit is made in her absence by her attorney, it need not aver the absence of the husband. *Hart vs. Connolly*, 49 A. 1587.

Art. 237. At What Time Arrest May Be Ordered. Petition May Be Filed Next day—

"A creditor may have his debtor arrested when such debtor is about leaving the State, at the very moment of instituting his action, while it is pending, in every stage of the proceeding and even after appeal. And in all cases where attachments, arrests, sequestration and provisional

seizure are demandable, the plaintiff, his agent or attorney having made affidavit and given bond in conformity to law, and having filed the same in court, and having obtained the order of the judge for the issuance of the writ, it shall be the duty of the clerk to issue forthwith the same without any petition being then presented, but the usual petition shall be filed on the day succeeding that on which the said process shall have issued, except in cases where a Sunday or a legal holiday shall be the succeeding day; then on the next day succeeding such day of public rest, and the sheriff shall proceed immediately to execute said process according to law."

SEC. 2. *Be it further enacted, etc.*, That all laws and parts of laws conflicting with this act, or contrary to any of its provisions, be and the same are hereby repealed. (As amended by Act 14, 1880, p. 20).

Art. 239. Attachment—

Defective service will suffice to dissolve the writ. *Lehman, Stern & Co. vs. Broussard*, 45 A. 346.

Mention of an improper judicial district in the caption of a writ of attachment, will not justify its dissolution. *Standard Cotton Seed Oil Co. vs. Mathison*, 47 A. 710.

Art. 240. Causes for Attachment—4. Fraudulent Mortgages, etc., Preference.—

Where an insolvent person who had been mortgaging his property confesses judgment in favor of some of his creditors, attachment will lie in favor of another to whom the debtor refused a like concession. *Joseph Bowling Co. vs. Calvin*, 49 A. 1340.

The debtor who by different acts sells all his property to one creditor and only in a sale for a part of it imposes on the vendee the obligation to make a *pro rata* division of the price among his creditors gives an "undue preference" to the purchasing creditor. *Appleby et al. vs. Lehman et al.*, 51 A. 473.

The allegation "that the defendant had mortgaged, assigned or disposed of" or was about to do so of his property, "with intent to defraud his creditors" is not sustained where the allegation rested on the record of a mortgage by the defendant in favor of his wife, and the attack on the validity of that mortgage is withdrawn. *Koenig vs. Huck*, 51 A. 1368.

Where an attaching creditor had valid grounds for the writ, it will not be dissolved at the suit of other creditors, because the first creditor had employed the attorney who had before that represented the defendant, or because no active defense was made. *Rawlins et als. vs. Sheriff et al.*, 45 A. 58.

The mere request for extension, conditioned upon the assent of all creditors, and combined with suspension of payment and the continual

sale of goods, will not justify an attachment. *Block vs. Creditors* 46 An. 1334.

The burden of proving the grounds assigned for attachment are upon the plaintiff, where the *prima facie* case established by the affidavit is met with some proof, and the proof necessary to sustain the writ, must refer to the state of facts existing when the affidavit was made. *Ibid.*

Defendants, residents of Mexico, gave their notes to a third party in Louisiana to obtain certain machinery which it was the duty of plaintiff to furnish under his contract; at the request of plaintiff they sent to Louisiana the money to pay these notes. For an alleged balance the plaintiff attached this money. Held, that the attachment should be dissolved, because the notes were given for a debt which the plaintiff himself should have discharged. *Taylor vs. Almanda Bros.*, 50 A. 351.

Art. 244. Debt Not Due—Oath—

The insolvency of the principal does not mature the debts against the surety, and a suit against him and an attachment served against his property will be dissolved on plea of prematurity, where the suit was instituted before the debt is due. *State National Bank vs. New Orleans Brewing Association et als.*, 49 A. 935.

Art. 245. Attachment Bond—

"A creditor, his agent or attorney in fact, praying such attachment, must, besides, annex to his petition his obligation in favor of the clerk of the court before which the writ issues for a sum equal to that which he claims, with the surety of one good and solvent person, residing within the jurisdiction of the court to which the petition is presented, as a security for the payment of such damages as the defendant may recover against him, in case it should be decided that the attachment was wrongfully obtained."

SEC. 2. *Be it further enacted*, That all laws and parts of laws in con-
erewith be and the same are hereby repealed (as amended by
Act 17, 1880, p. 21).

See Act 103, 1870, printed under Art. 214.

An attachment bond, in which no amount is mentioned, is defective, and the defect is not cured by the affidavit of the surety. *Lehman, Stern & Co. vs. Broussard et al.*, 45 A. 346.

A member of a co-partnership is not in his individual capacity a competent surety on the attachment bond in which the co-partnership are the principals. *Bayne & Onorato vs. Cusimano*, 50 A. 361.

Art. 246. Garnishment—

The court had ordered garnishees in attachment proceedings to answer in open court. On objection to the order, it was rescinded.

Held, that **MANDAMUS WILL NOT LIE TO REINSTATE THE ORDER**. That it was not a ministerial duty of the judge **TO ORDER GARNISHEES** in proceedings like this, **TO ANSWER IN OPEN COURT**. *State ex rel. Sentas vs. Judge*, 49 A. 696.

See annotation to Art. 642.

Art. 254. Posting Citation in Case of Absent or Absconding Debtor—

Attachment was levied on property of an absentee. The constable made a written return on the writ, but not on citation. Held, that the appointment of a curator *ad hoc* and all subsequent proceedings were void, because there was no written return on the citation showing it had been nailed to the court house door. *State ex rel. Griffith vs. Judge et al.*, 50 A. 170.

The attachment was obtained on the allegation that defendant was a non-resident and a curator *ad hoc* was appointed to represent her, but citation was not nailed to court house door. Defendant averred that she was not a non-resident, and pending the trial she was served personally. The attachment was dissolved, as it could not be aided by the subsequent correct citation. *Elder & Davis vs. Ludeling*, 50 A. 1077.

Art. 257. Possession by Sheriff—Inventory—

A sheriff can not without the consent of the plaintiff proceed with the cultivation of a plantation which he holds under writ of attachment and have any loss which may result from his administration taxed as costs. His tenure under this writ is different from that under writs of sequestration, *fiert facias* or seizure and sale. *American Nat. Bank vs. Childs*, 49 A. 1859.

Art. 261. Sale of Perishable Property Pendente Lite.—

Contradictorily with defendant, a plaintiff in attachment obtained an order to sell the property under Art. 261 on five days' advertisement. After the sale was completed and vendees placed in possession certain creditors intervened to obtain a reversal of the order to sell. Held, that the intervention came too late, and intervenors were without interest to appeal from the order. *State ex rel. Victor & Achilles et als. vs. Judge*, 46 A. 1421. See annotation to Art. 254.

Art. 268. Judgment against Plaintiff—Damages—

In a reconventional claim for damages caused by a dissolved attachment, it was permissible for the claimant to prove loss and other injuries to their business, without setting out specific and separate amounts for each item. *Bickham & Son vs. Hutchinson & Bailey*, 50 A. 755.

Art 275. Grounds for Sequestration—

Sequestration will issue for a **DEBT NOT DUE**, only in the case provided in paragraph 5 of this article, and then only when the plaintiff

swears that he has a mortgage or privilege, and to "THE FACTS WHICH INDUCE HIS APPREHENSION." *Egan vs. Fush*, 46 A. 474.

The maturity of the debt, that it was not paid, and that defendants were selling the property, though in due course of business, will justify a writ of sequestration. *Goldman vs. Goldman & Masur*, 47 A. 1463.

Where a party sells goods to a dealer, he does so with the implied understanding that the purchaser intends to sell them, THE MERE FACT OF SELLING does not therefore give the right to sequester, but when the purchase price is not paid at maturity, the vendor MAY WITHDRAW HIS CONSENT TO SELL, and insist that the goods be placed in such a position that his lien will not be destroyed. This alone, however, does not justify the charge that defendant WILL CONCEAL. *American, etc., Co., vs. Grant, etc., Co.* 50 A. 931.

Affidavit as Evidence of Fear.

The affidavit for obtaining the writ is *prima facie* evidence of the facts authorizing its issue, (*The Cypress, etc., Co., vs. Lorio*, 46 A. 441), and where the defendant FAILS TO REBUT IT BY PROOF, the writ will be maintained. *Landwirth vs. Shaphran*, 47 A. 336; *Hewitt vs. Williams*, 47 A. 742.

On a motion to dissolve a sequestration, where the grounds on which it issued are charged to be false, plaintiff will be required TO DO MORE THAN REST ON PLEADINGS, but MUST SHOW AND SUSTAIN the grounds and facts on which the alleged fear was made to rest. *American Furniture Co. vs. Grant-Jung Furniture Co.*, 50 A. 931.

A sequestration will be dissolved where plaintiff's affidavit that "he fears that the defendant," etc., is attacked as untrue and is not sustained by the evidence adduced. *Vives vs. Robertson*, 52 A. 11.

Requisite for Supplemental Petition.

The original petition containing a prayer and affidavit for sequestration being filed before the debt was due, was dismissed in exception of prematurity. Before dismissal, but after exception, a supplemental petition without prayer for sequestration or affidavit was filed and the maturity of the debt alleged. Held, that the sequestration would be dissolved. *Egan vs. Fush* 46 A. 474; *Hewitt vs. Williams*, 47 A. 742.

Seizure of Same Property Under Second Writ.

When property has been sequestered under one writ, and the sheriff subsequently receives a second, the levy under the first writ is sufficient for the second. The receipt of the second is a constructive levy, and if the first writ is vacated, the property may be held under the second. *State ex rel Schwan vs. Judge*, 52 A. 568.

Art. 276. Sequestration Bond—

See Act 103, 1870, printed under Art. 214.

Art. 279. Bonding Sequestration—

Where the right to release sequestered property exists, it may be exercised in the lower court, pending a suspensive appeal from its judgment which does not involve that right. The right exists in every stage of the suit, and would be destroyed, were it denied in court below, and if the property has been sold, the proceeds may be bonded. State ex rel. Stuart vs. Judge, 45 A. 1322.

A sequestration of partnership property obtained by a co-proprietor, should not be dissolved on bond, and an appeal will lie from a judgment directing it, and where the purpose of the writ is to keep the property in *statu quo* pending the settlement of a co-partnership or corporation, it will be maintained (Eltringham vs. Clarke & Pringle, 49 A. 340), and where a judgment probating a will and putting in possession is attacked within three months, the judge may *ex proprio motu* order the sequestration of the property, and if the writ is dissolved, an appeal will lie from the decree. Schwan et al. vs. Schwan et als., 52 A. 1188.

The plaintiff's right to bond the goods sequestered by them on the allegation that they had a vendor's lien, is lost, where the debtor has made a cession of his property before the application to bond is made. State ex rel. Simmons & Cohn vs. Judge, 50 A. 621.

Act 94, 1900—To provide for the sale of property of a perishable nature and subject to be lost or deteriorated during the pendency of a sequestration or provisional seizure suit.

Be it enacted by the General Assembly of the State of Louisiana, That in all cases of sequestration or provisional seizure, if the property sequestered or provisionally seized be of a perishable nature and subject to be lost or deteriorated in value, during the pendency of the suit, the Court may at the request of the plaintiff order the sale of such property at public auction, after the usual advertisement, and after the same has been appraised by two experts appointed for that purpose, in order that the proceeds of such sale may remain on deposit in the hands of the sheriff until definitive decision of the suit; provided, this act shall not apply when property has been seized and is held by order of the Court, pending a decision of the question of possession or ownership; provided further, that nothing in this act shall be so construed as to prevent or prohibit either plaintiff or defendant from holding property seized under a writ of sequestration or provisional seizure, as now provided by law.

SEC. 2. *Be it further enacted, etc.,* That this act shall take effect from and after its passage.

Art. 287. Provisional Seizure; Requisites of Affidavit—

A writ of provisional seizure was dissolved because the affidavit was made BY THE ATTORNEY WHEN THE PLAINTIFF WAS PRESENT. Held, that defendant was entitled to damages in a limited amount—i. e., attorney's fees and other expenses incurred in dissolving the writ on motion. Hollingsworth vs. Atkins Brothers, 46 A. 515.

The failure of the judge to affix his name to the affidavit made by the plaintiff to obtain a writ of provisional seizure, will not render it null and void, when it is immediately succeeded by an order for the writ, signed by the judge. *State ex rel. Singreen vs. Downing, Judge*, 48 A. 1420. Nor will it destroy an affidavit for injunction. *Lewis vs. Daniels*, 23 A. 170. Nor for attachment. *English vs. Wall*, 12 Rob. 131.

See Act 94, 1900, printed *supra* under Art. 279, allowing the sale of perishable property *pendente lite*.

Art. 295. Provisional Seizure Issues Without Bond—

But see Act 103, 1870, printed under Art. 214.

Art. 296. Injunction—When the Writ Will Not Issue—

An injunction will not issue, where the act sought to be enjoined has already been committed, nor will it issue in a doubtful case. The purpose of the writ is to prevent, not to correct wrongs. *Callan vs. Board etc.*, 45 A. 673.

A tenant obtained an injunction to prevent his lessor from dispossessing him. On motion to dissolve the writ, it was shown that previously instituted ejectment proceedings had resulted in judgment for the lessor; the injunction was properly dissolved. *Mengelle & Co. vs. Abadie*, 45 A. 676.

An injunction to restrain executory proceedings will not issue under this article—which merely defines the writ. The subject is provided for in Art. 739. *Dupre, Admr., vs. Anderson*, 45 A. 1134.

A general allegation of threatened injury, without any announcement as to what the supposed injury will result from, or as to what it will result in, is totally insufficient to justify an injunction. *Otis vs. Sweeney*, 48 A. 940.

An injunction will not issue to prevent creditors residing in this State from suing in New York their insolvent debtor domiciled here, where the asset they seek to recover is a debt due the debtor by a corporation domiciled in New York, but having an agent here. *Commercial Soap Works et als. vs. Lambert*, 49 A. 459.

The wife separate in property sold certain property with the husband's consent. Suit by the purchaser was necessary to obtain possession, and the wife being dead, the heirs and husband were cited and he appeared. Judgment was given the purchaser and the husband sought to enjoin the execution on various grounds. Held, that the injunction was properly refused. *State ex rel. Kenner vs. Judge*, 50 A. 996.

Mandamus to a District Court will not lie to direct the issuance of an injunction, where it appears that the writ was not necessary to preserve the rights of relators. Their right to the writ—when necessary—is reserved. *State ex rel. Scott vs. Judge*, 52 A. 309.

Jurisdiction Ratione Materiae et Personae.

The property of a surety on a bond for the appearance of one Jackson in a criminal proceeding in St. Mary parish, having been seized in Jefferson parish, where the surety resided and the property was situated, under a *fi. fa.* issued in St. Mary, the District Court of Jefferson parish has jurisdiction to enjoin the execution, where the petition for injunction contains the allegation that the proceedings were VOID, NOT MERELY VOIDABLE. Langridge, Sheriff, vs. Judge, 46 A. 29.

The Civil District Court for the parish of Orleans is without power to enjoin the execution of a criminal statute, and *certiorari* will lie to prevent punishment for contempt in violating the order. State ex rel. City vs. Judge, 48 A. 1448; Lecourt vs. Gaster et als., 49 A. 487.

The court to which application is made by a resident of another State for executory process, has jurisdiction to issue its writ enjoining the seizure and to appoint a curator *ad hoc* to represent the absent defendant in injunction. Phillips et al. vs. Adame Mach. Co., 52 A. 442.

Petition—Exception.

It is a general but not an invariable rule, to give notice to a party obtaining an injunction prior to a modification or rescission of the order. If, however, it is not done, he should be subsequently notified, so that he may protect his interests. State ex rel. Lehman vs. Judge, 46 A. 163.

Plaintiff in executory process was enjoined by the defendant on the allegation that there was a deficiency in the quantity of the land for which the notes sued on were given. Defendant in injunction filed exception of "no cause of action," which being dismissed on appeal, was held not to be a waiver of the right to try the case on its merits. Gughelmi vs. Geismar, 46 A. 280.

The allegations of the petition being admitted by the exception of no cause of action for the purposes of the exception, and the allegation being that a certain condition constituted a nuisance *per se*, an injunction by the Board of Health will lie to restrain it. Board vs. Maginnis, 51 A. 806.

When Rule Nisi Will Issue—Discretion of Judge.

It is within the discretion of the judge to direct a rule *nisi* to issue where it is sought to enjoin a municipal corporation in matters affecting the public health, safety or convenience, and the defendant in its answer will be permitted to make such a showing as will enable the court to exercise a prudent discretion in granting or denying the writ. State ex rel. Lafitte vs. Judge, 51 A. 1768.

Art. 301. Injunction and Settlement in Concurso.—

An ordinary creditor can not, under this article, compel a creditor, proceeding under a judgment, to bring the seized property into

court for ratable distribution among all the creditors of a common debtor. *Thompson & Co. vs. Sheriff et al.*, 47 A. 1401.

Art. 303. Injunction to Preserve Property or Prevent Waste.—

The petition for injunction did not show that irreparable injury would result from an alleged nuisance caused by a business apparently lawful, and the original order prohibiting the business was modified in a rule to show cause, so as to permit the conduct of the business according to law. Held, that mandamus will not lie to compel the lower judge to grant a suspensive appeal from the modified order permitting the conduct of the business *pendente lite*. *Koehl et al. vs. Judge*, 45 A. 1488.

The court is not deprived of the discretion to permit an injunction to be bonded, because the issue of the writ under this article was itself within the discretion of the court. Nor will the mere allegation that the threatened injury is irreparable deprive the court of the power to permit the writ to be bonded, and where the injunction issued to aid a plaintiff in a possessory action, and possession on the face of the papers was doubtful, the defendant will be permitted to bond. *Cameron vs. Godchaux*, 48 A. 1345.

Injunction will lie to restrain a mortgagor from committing any act depreciating the value of the property mortgaged, and to protect a servitude acquired before but not after date of a mortgage. *Middlesex Banking Co. vs. Nelmeier & Darragh*, 50 A. 755.

An injunction will lie to restrain a co-owner in indivision from cutting timber on the common property without the consent of his co-owner, and such an injunction can not be dissolved on bond. *State ex rel. Hake vs. Judge*, 52 A. 103.

Art. 304. Petition, Affidavit, Bond, Surety, Liability.—

Where the husband authorizes the wife to bring an injunction suit, the law implies his authorization to her making a bond, and his signature to the bond is not necessary, and where, in the absence of the wife, her attorney makes the affidavit and signs the bond, it was unnecessary for the affidavit to state the absence of the husband. *Hart vs. Connolly*, 49 A. 1587.

The execution of "A" was enjoined by "B." Pending the injunction, the property was sold under the writ of "C" and the proceeds paid to "A," who had filed his third opposition in the proceeding of "C." Subsequent to the sale, the injunction of "B" was dissolved. Held, that "A" was not entitled to the statutory damages, but would be allowed attorney's fees. *Monroe, etc., Ass. vs. Sheriff*, 51 A. 470.

Art 307. Injunction—Dissolution by Bonding—

An injunction issued to restrain a person from so conducting a livery stable as to constitute it a nuisance will not be dissolved on bond. The business is not *per se* a nuisance, and if properly conducted would not violate the injunction. To dissolve the writ on bond would be to permit its conduct in the alleged illegal and offensive manner complained of. *State ex rel. Violett vs. Judge*, 46 A. 78.

An injunction obtained by an adjudicatee of property at a sale under *f. fa.* to prevent the sheriff from selling the property *a la folle enchere*, should not be dissolved on bond, and an appeal will lie from an order directing it, though rendered contradictorily with the adjudicatee. *Well vs. Schwartz*, 49 A. 582.

For the purpose of deciding whether an injunction will or will not work irreparable injury, and so be or be not subject to bond by defendant in injunction, the averments of the petition must be taken as true with the limitation that it extends only to allegations well pleaded, not to conclusions of law nor matters of mere evidence pleaded in the petition. *Capitol City, etc., Co. vs. Judge*, 50 A. 266.

The execution of a judgment was enjoined, and on *ex parte* application of defendant, the injunction was dissolved on bond. Held, that the dissolution should not have been issued *ex parte*, and *certiorari*, etc., will lie to reinstate the writ. *State ex rel. Van Halen vs. Monroe*, Judge, 50 An. 642.

An injunction will lie to restrain a co-owner in indivision from cutting timber on the common property without the consent of his co-proprietor, and such an injunction can not be dissolved on bond. *State ex rel. Hake vs. Judge*, 52 A. 103.

Art. 308. Violation of Injunction—

“If one against whom an injunction is directed in any wise violate or refuse to obey the same, the court may either cause to be destroyed whatever may have been done in contradiction of the injunction, if practicable, or may punish him by an imprisonment not exceeding ten days, but which may be repeatedly inflicted, until the party obeys the mandate of the court, provided these proceedings be by rule which shall issue and be made returnable within five days, on plaintiff's sworn petition alleging such violation or refusal, said rule to be triable at chambers or in open court. The party aggrieved by said violation or refusal may also recover from said person on the trial of the injunction such damages as he may have sustained from such disobedience.”

SEC. 2. *Be it further enacted, etc.*, That all laws and parts of laws contrary to or inconsistent with this act, are hereby repealed, and that this act shall take effect from and after its passage. (As amended by Act 77, 1896, p. 109).

An injunction had been modified by a subsequent order, and so modified was perpetuated. A suspensive appeal was taken by defendant in injunction, who thereupon continued to do the act permitted by the modified, but not by the original order of injunction. Held, not to be contempt of court, and that *habeas corpus* would issue to release the defendant in injunction from imprisonment. *State ex rel. Schoenhansen vs. Judge*, 47 A. 696.

See annotation to Art. 131.

The Civil District Court of New Orleans is without power to enjoin the execution of a criminal statute, and *certiorari* will lie to prevent punishment for contempt in violating the order. *State ex rel. City v. Judge*, 48 A. 1448; *Lecourt vs. Gaster et als.*, 49 A. 487.

The violation of an injunction exposes the violator to punishment for contempt, unless it be a case of "very exceptional character." *State ex rel. Fowler vs. Judge et al.*, 50 A. 1006.

See Art. 131 as amended by Act 190, 1894, and Act 189, 1898, printed after Art. 131.

Art. 313. Jury to Assess Damages—

A jury need not be called to confirm a default for dissolving the sale of a plantation for the non-payment of the price. *Nicholls vs. Elevenu et al.*, 47 A. 355.

Art. 330. Exceptions, When Evidence Not Admitted to Support Them—

Where plaintiff in a petitory action, treats the transfers of the property, other than that to the defendant, as absolute nullities, and therefore fails to make the transferrors parties to the proceeding, the defendant in his exception mentioning the transfers, will not be permitted to support it by evidence of the transfers. This can only be done on a trial of the merits. *Biland et al. vs. Gobelin et al.*, 46 A. 336; *Heins et Ford vs. Mills et al.*, *Id.* 331; *Mays vs. Wilkowski*, *Id.* 1475; *Danteriew vs. Opera House Association et al.*, *Id.* 1316; *Callahan et al. vs. Flaher*, 47 A. 427.

Art. 361. Death of Party After Issue Joined.

The right of action for damages given to certain survivors under R. C. C. 2315, abates at the death of the survivors there named, although the action had been instituted, tried and submitted to the court, but not decided when the plaintiff died. *Chevers vs. Roger*, 50 A. 57.

Art. 366. Compensation or Set Off.

Damages arising from the failure to entirely perform a contract, may be pleaded in compensation to notes given in consideration of the contract. *Phillips et al. vs. Adams Machine Company*, 52 A. 441. (The

court appears to base its opinion on the principle that there could be no recovery on a note in the hands of the original payee, when the consideration of the note has failed—at p. 447. Besides the plaintiffs were non-residents).

Art. 375. When Defendant May Reconvene—

"In order to entitle the defendant to institute a demand, in reconvention, it is required that such demand, though different from the main action, be, nevertheless, necessarily connected with and incidental to the same; as, for instance, the demand instituted by the possessor in good faith against him who sues in order to evict him or for the purpose of obtaining the payment of the improvements made on the premises; *provided*, that when the plaintiff resides out of the State, or in the State, but in a parish different from the defendant, said defendant may institute a demand in reconvention against him for any cause, although such demand be not necessarily connected with or incidental to the main cause of action; and *provided further*, that in all cases of arrest, attachment sequestration, provisional seizure and injunction the defendant may, in the same suit by reconventional demand, recover from the plaintiff the damages he may have sustained by the illegal resort to such writ." (As amended by Act 50, 1886, p. 84).

Where subsequent to the institution of the suit, the plaintiff removed to a different parish, the defendant may bring his reconventional demand in the same proceeding for any cause. *Rigney vs. Monette*, 45 A. 940.

Defendant in injunction staying executory process, may reconvene for damages. *Levy et al. vs. Thompson et als.*, 48 A. 410.

In a suit for divorce a reconventional demand was filed for separation from bed and board. Held, that no formal answer was required to the reconventional demand, and that plaintiff could contest it by evidence inapplicable to his main demand. *Suberville vs. Adams*, 46 A. 119.

Costs follow the judgment rendered in favor of the party to whom a balance was found due. *Bloch vs. Creditors*, 48 A. 1334

Art. 390. Interest in Suit Justifies Intervention—

AN ORDINARY CREDITOR CAN NOT INTERVENE in a suit between another creditor and the common debtor, where there is no charge of fraud and collusion between the parties to the suit. *Lincoln vs. New Orleans Express Company, Limited*, 45 A. 729.

Art. 391. Intervention Must Not Retard Principal Suit—

The plaintiff can not confirm his default before the intervenor has had time to cite the parties and put the intervention at issue. *White Castle, etc., Company vs. Hart*, 48 A. 1034.

Art. 396. Third Opposition to Assert Ownership or Privilege—

Where a third opponent who intervenes claims to be the owner of property sequestered, without attacking plaintiff's claim or privilege, he will be restricted to question of ownership *vel non*. O'Neil vs. Walker Brothers, 45 A. 609.

One who had instituted his suit, and thereafter intervened in another suit between the defendant and another, for the purpose of protecting his privilege and rank, will be restricted to the issue he presented in his intervention, and can not in that suit recover a judgment against the defendant for the amount of his claim. Austin vs. Williams, 46 A. 509.

Art. 398. Third Opposition to Seizure of Property Not Belonging to Defendant—

While one can not ask for the nullity of a sale and its proceeds, he may yet amend his petition so as to ask for the nullity alone, if opportunity is given the defendant to present his defenses in as ample a manner as if opponents had filed a direct action. Especially is this so in New Orleans where the rules of court would docket a direct action in the same cause. Herber vs. Thompson, 46 A. 186.

Where a judgment, regular in form, setting aside an asserted mortgage of the wife, has been rendered by a court of competent jurisdiction, she can not collaterally attack the judgment by an intervention and third opposition claiming the proceeds of a sale provoked by a creditor of a purchaser of the property on which that mortgage had borne. Equitable Security Company vs. Bloch, 51 A. 478.

Art. 419. Amendment of Petition After Issue.—

When the original petition of intervention and third opposition asked for both the nullity of the sale and its proceeds, an amendment will be allowed restricting the demand to nullity alone, where opportunity is afforded the defendant to prosecute his defenses in as ample a manner as if opponents had filed a direct action. Especially is this so in New Orleans, where the rules of court would docket a direct action in the same cause. Herber vs. Thompson, 46 A. 186.

An amended petition, filed after an exception, may be considered in determining the exception. Goldman et al. vs. North British, etc., Co., 48 A. 223.

Art. 420. Amendment of Answer.—

An amendment to answer, merely amplifying the original averments, is properly permitted. Cawthon vs. Kimbell et al., 46 A. 750.

Plaintiffs sued for the recovery of certain property which defendant claimed to hold under certain conveyances. In an amended answer the

defendant sought to correct an error in a deed as to a portion of the property. Held, that defendant was entitled to the amendment, which did not change the issue. *Gladdish et al. vs. Godchaux*, 46 A. 1571.

In a suit for damages for injury done to plaintiff's property, the defendant filed a general denial, and later amended and averred that the damage had been repaired. Held, that the amendment was properly allowed, as it did not change the original issue. *Koerber vs. Levee Board et als.*, 51 A. 523.

When the rule of court is that notice must be given the adverse party of causes put at issue after term of court begins, a judgment rendered on an amended answer and reconventional demand filed after term began, and without notice to plaintiff thereof, will be set aside. The reconventional demand changed the issue as presented by the general denial, and notice before judgment was necessary. *City of New Orleans vs. Le Bourgeois et al*, 50 A. 591.

Art. 438. Interrogatories Accompany Commission—

The mere statement in the motion for a commission to take testimony out of the State, that the testimony sought is material, is not sufficient to obtain the commission, where the motion is not accompanied by the interrogatories to be propounded. *Stierle vs. Kaiser*, 45 A. 580.

Art. 439. Return Day—Rule to Receive Deposition—

The motion for a commission to take the deposition of an absent witness was without an affidavit as to materiality, etc. On return of the commission a rule was taken why the depositions should not be used in evidence and on hearing made absolute. Held, a waiver of the rule. *Dunlap vs. Dunlap*, 49 A. 1696.

Art. 462. Compensation of Experts, etc.

See *Bryant & Mathers vs. M. Levy & Sons*, 52 A. 1664.

Art. 464. Continuance to Obtain Necessary Evidence—

A party who with the exercise of the utmost possible diligence has been unable to secure his proofs, which he shows are actually in the way, is entitled to a brief delay. *Suc. of White*, 45 A. 663.

Art. 468. Discretion to Grant Continuance—

The illness of counsel having charge of a case is ground for a continuance. *V., S. & P. R. Co. vs. Scott*, 47 A. 706.

The refusal of a continuance asked for because one of the leading counsel was absent, his presence being required in other courts of the state, will not be disturbed, when it appears that an associate counsel is present. *Johnson vs. Dean*, 48 A. 100.

Art. 473. Subpœna Duces Tecum to Parties to Suit—

On the allegation that plaintiff's books would show that the defendant was not his debtor, the intervenor may have defendant's books brought into court after trial has begun, if no delay is thereby occasioned. *Wolff vs. Wolff*, 47 A. 548.

Art. 482. Competent Witnesses, Husband and Wife.

An Act, to amend and re-enact Article 2281, of the Revised Civil Code of 1870.

SECTION 1. Be it enacted by the General Assembly of the State of Louisiana, That Article 2281 of the Revised Civil Code of 1870, be amended and re-enacted so as to read as follows:

Article 2281. The competent witnesses of any covenant or fact, whatever it may be, in civil matters, is a person of proper understanding. The husband can not be a witness for or against his wife, nor the wife for or against the husband; but in any case where the husband or wife may be joined as plaintiffs or defendants, and have a separate interest, they shall be competent witnesses for or against the separate interest therein; and provided further, that in all civil suits for damages instituted by the husband for or on account of personal injuries sustained or suffered by his wife, the wife shall be a competent witness.

Provided further, That in all cases where either spouse has acted as the agent of the other spouse, such spouse so acting as agent shall be a competent witness as to all transactions arising from, involved in, or connected with such agency, but no statement or statements of either party in suits for separation of property and separation from bed and board or divorce shall be received in evidence.

SEC. 2. Be it further enacted, etc., That all laws or parts of laws in conflict with or inconsistent with this act be and the same are hereby repealed.

After the rendition of the judgment in the court *a qua* the foregoing act was adopted. Held, that the case would be remanded to enable the wife to testify, which, before the passage of the act, she could not do *Dunning vs. West*, 51 An., 618.

Art. 491. Discontinuance—

Previous to judgment, the plaintiff may discontinue his suit on paying costs, except where an intervenor sues for the dissolution of an injunction obtained by the plaintiff with damages, or defendant sues in reconvention, or plaintiff's rights have been seized by a third person. Where the trial and the taking of evidence has begun, the judge may, on motion to discontinue, render the judgment he may deem proper. *State ex rel. Gondrain vs. Rost*, Judge, 48 A. 455.

When parties to a suit permit it to remain dormant for seventeen years in the archives of a court which has been abolished, and take no

steps to transfer it to a proper existing tribunal, the suit will be considered as abandoned by them. *Raymond et al. vs. Conery*, 50 A. 155.

Art. 517. Exceptions to Charge—

Exceptions to refusal of court to give the jury certain charges *in globo* must designate the specific instruction the refusal of which is excepted to. Mere abstract propositions of law, without particular bearing on the case, are properly refused. *Wimbush vs. Hamilton*, 47 A. 246.

Art. 527. Polling of Jury—Number Necessary for Verdict.

"After the reading of the verdict he shall ask the jury if the verdict has been agreed to, and if the foreman answers in the affirmative, he shall enter the verdict upon the records of the court, unless one of the parties require that the jury shall be called and each of them asked if he has agreed to the verdict, and if it appears that nine or more of the jurors have agreed to the verdict, the same shall be recorded."

(As amended by Act 116, 1880, p. 141.)

Art. 532. Discontinuance Permitted up to Withdrawal of Jury—

See annotation to Art. 491.

Art. 542. Judgments Must be Read in Open Court—

A judgment should be read and signed in open court, and it should somewhere appear affirmatively that it was done. *Woodlief vs. Logan et al.*, 50 A. 439.

In a case pending in the Circuit Court of Appeals (composed of two judges) the parties submitted the case and agreed that the judges should decide it in Chambers. The judges being unable to agree, they selected a judge *ad hoc* at the first session after submission. Objection was made thereto by relators, but the court, disregarding it, decided the case at a special term, not fixed by the Constitution. Held, that a term of court could be held only at the dates fixed in the Constitution, and that the selection of a judge *ad hoc* was not within the agreement to have the case decided in Chambers. *State ex rel. Railroad Co. vs. Judges* 48 A. 905.

Art. 546. What Judgments must be Signed and When—

A judgment making a rule absolute need not be signed, the signature of the judge is only required to final judgments. *State ex rel. Rozier vs. Judge*, 50 A. 19; *Fox vs. Tio*, 1 A. 334.

A judgment dismissing a petition as disclosing no cause of action is a final judgment and must be signed before an appeal can be prosecuted. *Nicholls vs. Maddox*, 52 A. 497.

Art. 547. Amendment of Judgment—

Within the delay for making the judgment final, the court may correct a trivial error as to amount. *Goldman vs. Goldman & Mason*. 47 A. 1463.

The judgment below was changed after rendition without notice of rule for new trial. Held, that where the testimony supports the judgment finally rendered, the irregularity was unimportant. *Sealy vs. Hall et al.*, 50 A. 412.

Art. 549 Party Cast Pays Cost—

The party cast in a suit must pay the costs unless a special statute exists to relieve him. There is no statute of the kind in favor of the defendants. *New Orleans, etc., R. Co. vs. Board of Levee Commissioners of Orleans Levee Dist.*, 48 A. 1098.

See annotation to Art. 157.

Art 553. Interest Allowed in Judgement.

"There is no prayer for interest in the petition, but we think substantial justice will be done by allowing interest from judicial demand under the prayer for general relief." *Schwartz vs. Cronan*. 30 A. 1002. Where in a reconventional demand, interest is claimed, it will be allowed though there is no express prayer for it. *Sentell vs. Hewitt*. 46 A. 1028.

Art. 560. New Trial Granted, When—

A new trial may be granted where the judgment is one of non-suit. *State ex rel. Moore vs. Judge*, 50 A. 683.

Art. 565. Appeal from Final Judgments—

By final judgment on appeal the parties were referred to a notary to make a partition. The parties disagreed in their INTERPRETATION OF THE JUDGMENT. A rule to try the matter was taken, and the performance of certain acts ordered. From this order an appeal was taken. Held, that the order was INTERLOCUTORY, intended to carry into effect the JUDGMENT ORIGINALLY APPEALED FROM, and that appeal would not lie at this stage of the proceeding. *Murphy vs. Murphy et al.*. 45 A. 1482.

A judgment of non-suit is a final appealable judgment. *Vicksburg S. & P. R. Co. vs. Scott, etc.*, 47 A. 706.

Art. 567. No Appeal from Judgments Acquiesced in.—

It was not ACQUIESCENCE in the judgment for the defeated plaintiff to ask that IT BE SIGNED for the purpose of appeal. Motion to dismiss overruled. *Randall vs. R. R. Co.*, 45 A. 778.

The receipt of a part of a judgment—though with reservation of the right of appeal—is **ACQUIESCENCE**, and destroys the right of appeal. *Flowers vs. Hughes et al.*, 46 A. 436.

In the *concurso* resulting from insolvent proceedings, **EACH CREDITOR WHO THINKS HIMSELF AGGRIEVED** must appeal in order to have the judgment amended. Those who do not appeal **WILL BE HELD TO HAVE ACQUIRED**; they are appellees. *Andrus vs. Creditors*, 46 A. 1351.

Pending an appeal in a possessory action by the defendant, the latter instituted in the court below a petitory action. Held, not ground for the dismissal of the appeal on the ground of **ACQUIESCENCE IN THE JUDGMENT APPEALED FROM, OR ABANDONMENT OF APPEAL**; that the exception of *lis pendens* to the petitory action was the proper remedy. *Vigo vs. Carlon*, 48 A. 665.

If the demands passed on by the judgment are distinct, **ACQUIESCENCE IN ONE OF THE DEMANDS** does not prejudice the right of appeal as to others. *Suc. of Kaiser*, 48 A. 974.

Art. 570. When Appeal Lies to Supreme Court—

Jurisdiction of Supreme Court is governed by Art. 85, Constitution 1898, which reads as follows:

"The Supreme Court, except as hereinafter provided, shall have appellate jurisdiction only, which jurisdiction shall extend to all cases where the matter in dispute, or the fund to be distributed, whatever may be the amount therein claimed, shall exceed two thousand dollars, exclusive of interest; to suits for divorce and separation from bed and board, and to all matters arising therein; to suits involving alimony, or the nullity of marriage, or for interdiction; to all matters of adoption, emancipation, legitimacy, and custody of children; to suits involving homestead exemptions, and to all cases in which the constitutionality or legality of any tax, toll or impost whatever, or of any fine, forfeiture, or penalty imposed by a municipal corporation, shall be in contestation, whatever may be the amount thereof, and to all cases wherein an ordinance of a municipal corporation or a law of this state has been declared unconstitutional, and in such cases the appeal on the law and the facts shall be directly from the court in which the case originated to the Supreme Court; and to criminal cases on questions of law alone, whenever the punishment of death or imprisonment by hard labor may be inflicted, or a fine exceeding three hundred dollars, or imprisonment exceeding six months, is actually imposed. Said court shall have such original jurisdiction as may be necessary to enable it to determine questions of fact affecting its own jurisdiction in any case pending before it, or it may remand the case; and shall have exclusive original jurisdiction in all matters touching professional mis-

conduct of members of the bar, with power to disbar under such rules as may be adopted by the court."

See C. P., Art. 874, 875.

The reader should note the changes in the law as laid down in the following cases, by the article of the Constitution of 1898, *supra*.

Note cases decided under Art. 81, Constitution 1879.

Jurisdiction Ratione Materiae.

The test of jurisdiction for appeal by an intervenor who gives a bond for the production of property in a provisional seizure is the value of that property, where he does not claim anything else than that property. *State ex rel. Scooler vs. Court of Appeals*, 47 A. 740. (The effect of Constitution 1898, Art. 85, should be considered. This decision was rendered in 1895.)

INTEREST ACCRUED TO DATE OF SUIT, will be counted to fix appellate jurisdiction. *Bruno vs. Oviatt*, 48 A. 471.

Plaintiffs held ten notes of \$800 each, secured by vendor's lien, etc., on a certain plantation. Two of the notes being unpaid at maturity suit was instituted *via ordinaria*. Held, the court had jurisdiction, as judgment on the two notes would be *res adjudicata* as to the remaining seven. The issue raised by the pleading was the ASSUMPTION *vel non* OF THE ENTIRE DEBT by the defendant, the vendee of the original vendor. *Vinet, Dative Testamentary Executor, etc., vs. Bres et al.*, 48 A. 1254.

Where the damages claimed are based on facts, which can not possibly sustain them, they will not be considered as conferring jurisdiction on this court *ratione materiae*. *Wall vs. Stewart*, 48 A. 1431.

One who claims a certain account of another who is alleged to be the forced heir of a third person is GOVERNED IN HIS RIGHT OF APPEAL by the amount of his claim, and not by the fund to which the heir may be entitled. *Fischel vs. Alexander, etc., et al.*, 48 A. 1533.

An appeal in a petitory action will not be dismissed, when AFFIDAVITS SHOW THE VALUE of the property in question to be over two thousand dollars—and especially where appellant's APPEAL HAS BEEN DISMISSED IN THE COURT OF APPEALS, because the cause was within the jurisdiction of this Court. *Senes vs. Walshe*, 49 A. 781.

Where mortgage creditors whose claims AGGREGATE MORE THAN TWO THOUSAND DOLLARS, jointly ask that another mortgage also exceeding that sum be erased, this court has jurisdiction *ratione materiae*. *Baker et al. vs. Lee et al.*, 49 A. 874.

Where parties to a sequestration proceeding VALUE THE SEQUESTERED PROPERTY at less than two thousand dollars, a suspensive appeal to this court will not lie, from an order permitting the defendant to bond the writ. *State ex rel. Toilet Supply Company vs. Judge et al.*, 50 A. 1168.

SEVERAL CREDITORS MAY JOIN in a revocatory action to set aside alleged fraudulent practices of several other creditors of the common debtor, and where the prayer is to ANNUL JUDGMENTS AMOUNTING TO OVER TWO THOUSAND DOLLARS, this court has jurisdiction, though the claims of plaintiffs taking singly, are each below the jurisdictional amount. *Marx et als. vs. Meyer Bros. et al.*, 50 A. 1229.

Where in the petition verified by an affidavit, THE AMOUNT CLAIMED IS SUFFICIENT to give this court jurisdiction, the appeal will not be dismissed on motion alleging that the testimony taken in the court below shows an insufficient sum. On such a motion the testimony can not be considered, as it reaches the court only on examination of the merits. *Heirs of Marimon vs. McPeak et al.*, 50 A. 1631.

Amount claimed was within the appellate jurisdiction—amount admitted BUT NOT DEPOSITED OR CONSIGNED, left balance below the necessary amount. The judgment appealed from REJECTED THE WHOLE CLAIM; held, that appeal will not be dismissed. *Suc. of Foster*, 51 A. 1670.

Executory process issued at the instance of the holder of five notes each for twelve hundred dollars—two of said notes had matured. The property was sold for eighteen hundred dollars cash, balance assumed by purchaser. An intervenor claimed a prior lien for \$2849, and appealed from an adverse decision. Held, that this court was without jurisdiction *ratione materiae*, as only the fund in hands of the sheriff was subject to intervenor's claim. *Bank vs. Muller*, 52 A. 553.

For damages resulting from an injunction which had been dissolved plaintiff CLAIMED \$2650. One of the defendants was the surety on the INJUNCTION BOND OF \$400, and as to him judgment was prayed for that amount. Held, that as to the surety, the court was without jurisdiction. *Levert vs. Sharpe et al.*, 52 A. 599.

Art. 571. Third Persons May Appeal—

The court will dismiss an appeal, TAKEN BY A THIRD PERSON, when the record shows that HE HAS NO INTEREST in the appeal and IS NOT AGGRIEVED by the judgment and which as to him is not *res adjudicata*. *City, etc., vs. Dufossat et als.*, 46 A. 398.

When a third person appeals, ALLEGING INTEREST, it suffices to make plaintiff and defendant parties to the appeal, it appearing THAT NO OTHER PARTY HAD AN INTEREST, and where a motion to dismiss the appeal puts at issue appellant's pecuniary interest which has not been established in the court below, and puts at issue other questions of fact, the case will be remanded, to try these questions. *Vincent vs. Phillips*, 47 A. 1216.

An appeal will lie from a judgment HOMOLOGATING THE ACCOUNT OF A RECEIVER so far as not opposed, and it may be taken BY A CREDITOR who has not opposed. It was properly "rendered and signed"

on November 27, when the first advertisement was made on the 16th of the month. An homologation "so far as not opposed" or as a whole, should not be had without some proof. In the matter of the Pelican etc., Company in Liquidation, 48 A. 711.

When the corporation has consented to the appointment of a receiver, an appeal will not lie by a stockholder—NOT A PARTY to the proceeding below. The proper remedy is by a rule to set aside the appointment, and if the rule be denied to appeal from that judgment. *Harrod vs. Sewerage Co.*, 49 A. 1595. See annotation to Art. 575, sub-head "APPOINTMENT OF RECEIVER."

When the right of appeal is given to one not a party to a suit, he must allege and show wherein he is aggrieved by the judgment. *Bland et als. vs. Edwards*, 52 A. 822.

A judgment sending the widow of the deceased into possession of the succession property, on the allegation that there were no descendants, ascendants or collateral heirs, IS AN ABSOLUTE NULLITY, and may be appealed from BY A CREDITOR or one who claims to be AN HEIR. *Succession of Barber*, 52 A. 960.

One—NOT A PARTY TO THE SUIT—may appeal from the judgment but he must show that it WAS ERRONEOUS BETWEEN THE PARTIES to the suit, and that he has been aggrieved thereby. *Mutual Ins. Co. vs. Houchins et als.*, 52 A. 1138. The motion to dismiss on the ground that appellant was without interest, goes to the right of appeal and may be made more than three days after the return day. *Ibid.*

Art. 572. Appeal by Tutors, Curators, Executors, etc.—

An executor may appeal from a judgment adverse to his proposed distribution of the succession funds, made in accordance with his interpretation of the will. *Succession of Allen*, 48 A. 1036.

An executor who charges himself with amounts which he has paid can appeal from a judgment rejecting these items. His position in such a case should be distinguished from one he would occupy if the items had not been paid. *Succession of Heffner*, 49 A. 407.

An executor is without right to appeal from a decision below reducing or rejecting the claims of creditors of the succession, as they appear on the account of the executor. *Succession of Hartigan*, 51 A. 126.

Art. 573. Appeal by Motion or Petition—Divorce Cases—

"Whoever intends to appeal may do so either by petition or by motion in open court, at the same term at which the judgment was rendered upon offering to give such surety as the court may direct, as hereafter provided. But in cases where the judgment decrees a divorce, such

petition or motion of appeal must be filed within thirty days, not including Sundays, after the signing of such judgment, instead of ten days, and shall operate as a suspensive appeal therefrom, and there shall be no devolutive appeal allowed thereafter." (As amended by Act 49, 1871, p. 151).

Art. 574. Order of Appeal—Bond and Return Day—

When the return of an appeal could have been had for the October term of 1892, but because of appellant's suggestion was fixed for October term, 1893, a motion for a continuance to perfect the transcript filed, will be refused and the appeal dismissed. *Lewis vs. Boyet et al.*, 45 A. 1220.

Where the court fixes the PLACE and DATE of appeal the appellant will not be made to suffer because of any error. *Watkins Banking Co. vs. Louisiana Lumber Co.*, 47 A. 581.

A motion to dismiss an appeal because of informality in the order of appeal and the appeal bond, comes too late when made more than three days after filing of the transcript. An appeal will be dismissed *ex proprio motu* when the amount of alimony claimed is "below the lower limit of the court's jurisdiction." *Naghten vs. His Wife*, 48 A. 799.

An order for a "suspensive and devolutive appeal" upon plaintiff "giving bond as fixed by law for a suspensive appeal, and in the sum of one hundred dollars for the devolutive appeal," is a valid order, and appellant may bring up both appeals in one transcript. Act 41, 1894, is not unconstitutional, and a bond company is a legal surety. *Standard, etc., Co. vs. Matheson*, 48 A. 1321.

An appeal will not be dismissed because the order signed by the judge FIXED AN INCORRECT RETURN DAY, though the order was prepared by the appellant (previous decisions are apparently overruled.) *Pearce, etc., et als. vs. State ex rel. Brazeale et als.*, 49 A. 643; *Succession of McCan*, *id.* 968.

The order of appeal made it returnable "to the proper court." Held: Scarcely the order required under the statute, BUT CURED BY THE RECITALS OF THE BOND filed immediately after the order was granted." *Iberia, etc., Co. vs. The Cumberland, etc., Co.*, 51 A. 1022.

The appellant is authorized to complete either where the order permits both a devolutive or suspensive appeal, but if he fail to file the transcript for the appeal taken within the legal delay it will be dismissed. *Levy vs. Levy*, 52 A. 1920.

See Art. 898.

Art. 575. Suspensive Appeal, Bond, Security, Etc.—

"If the appeal has been taken within ten days, not including Sundays, after the judgment has been notified to the party cast in the suit, when such notice is required by law to be given, it shall stay execution and

all further proceedings until definitive judgment be rendered on the appeal; provided the appellant gives his obligation, with good and solvent security, residing within the jurisdiction of the court, and having property to the amount of the obligation within the State, in favor of the clerk of the Court rendering the judgment, for a sum exceeding by one-half the amount for which the judgment was given, if the same be for a specific sum, as security for the payment of the amount of such judgment, in case the same is affirmed by the court to which the appeal is taken.

Provided further, That the party furnishing the security shall prove his solvency to the satisfaction of the court, whenever it is questioned by any party interested in the appeal. And the party so questioning the solvency of said bond shall, if it be out of term time, cause a rule to issue ordering the appellant to show cause, at such time as the judge shall designate, why such bond should not be set aside for want of proper security, which rule shall be tried in chambers and in the parish where the rule was issued, within fifteen days after service thereof. Appeal bonds, in all cases of appeal, shall be made payable to the clerk of the court which rendered the judgment appealed from, and every appellee interested in the appeal shall have recourse on such appeal bonds against the appellant and the securities on the appeal bond for any liability that may accrue in favor of the appellee on account of such appeal.

Whenever judgment has been rendered in a suit which the defendant has had personal service to appear and file his answer, or when judgment has been rendered in a case after answer filed by the defendant or by his counsel, the party cast in the suit shall be considered duly notified of the judgment by the fact of its being signed by the judge.

Provided, that in the country parishes no execution shall issue in cases where an appeal lies until ten days after the adjournment of the court by which the judgment was rendered, within which delay a party may take a suspensive appeal on filing petition and appeal bond as now provided by law. (As amended by Act 45, 1890, p. 38.)

When Appeal Lies—Miscellaneous.

A party may appeal from a judgment in his favor where the decree is adverse to him. *Hewes et al. vs. Baxter*, 45 A. 1049. So also at his own instance from a judgment rendered in his favor to correct any error in it. *Police Jury vs. Suc. McDonogh*, 8 A. 362.

A suspensive appeal will lie from a judgment dissolving an injunction on bond, where it appears that the dissolution will permit the continuance of the alleged nuisance, and where the injury caused thereby "might be irreparable *vel non*." *State ex rel. Violett vs. Judge* 46 A. 78.

A suspensive appeal will not lie from an order DISTRIBUTING FUND on deposit in the court when the order has been made in pursu-

ance of A JUDGMENT HERETOFORE RENDERED and from which a devolutive appeal has been taken. *Durward et als. vs. Jewett et als.*, 46 A. 706.

Plaintiff in a suit for the revocation and annulment of certain alleged donations of improved real estate was ENJOINED FROM COLLECTING THE RENTS of the property, while THE JUDICIAL SEQUESTRATION which had been ordered at his instance, was dissolved. Held, that suspensive appeal must be allowed the plaintiff. *State ex rel. Lamothe vs. Judge*, 46 A. 1407.

A remittitur after verdict, or the deposit with the sheriff, by plaintiff in expropriation proceedings, of the amount awarded, is without effect on appellant's right to appeal. *New Orleans, etc., Ry. Co. vs. Mc-Neeley*, 47 A. 1298.

An appeal will lie from a judgment for alimony *pendente lite*. An appeal from the main judgment would not bring up this question for review. The matter is within the appellate jurisdiction of the Supreme Court when the alimony at the time the wife's claim had been disposed of in the court below, amounted to a sum in excess of that required to give the court jurisdiction. *Carrol vs. Carrol*, 48 A. 835.

For the purpose of interpreting its own decrees, an appellate court has jurisdiction, regardless of the amount involved. *Brown et al. vs. Pontchartrain Land Co.*, 49 A. 779.

A judgment signed, legally or illegally, is one from which an appeal will lie, and the legality *vel non* of the signature may then be inquired into. *State ex rel. Rozier vs. Judge*, 50 A. 19.

A suspensive appeal lies from a judgment dissolving an attachment. *Bayne & Onorato vs. Cusimano*, 50 A. 361.

Plaintiff in execution may appeal from an order appointing a receiver to the debtor corporation, where the appointment interferes with the execution. And where the appeal is properly to the Circuit Court of Appeals and mandamus is there prayed for to the judge *a quo* to grant the appeal, and it appears that the judges of the Court of Appeal are absent, this court will stay proceedings until the Court of Appeals can act. *State ex rel. Williams vs. Judge*, 51 A. 161.

The right of appeal by plaintiff in expropriation proceedings is not dependent on the deposit of the amount of the award below. The plaintiff may avail himself of the right to deposit, but is not compelled to do so for the purpose of appealing from the award. *Morgan's L. & T. R. Co. vs. Barton*, 51 A. 1338.

An appeal will lie in a proceeding where one claims to have been illegally discharged from an office, and files an affidavit showing the salary of the office to be in excess of the jurisdictional amount. *Peters vs. Bell*, 51 A. 1621.

See annotation to Art. 580.

When Appeal Does or Does Not Lie—Appointment of Receiver.

A suspensive appeal will not lie from an order appointing a receiver to a corporation, when it appears that its Board of Directors gave its consent to the appointment—as shown by a resolution of the Board presented to the court below. That the consent was obtained by misrepresentation and was subsequently rescinded, are facts which might have been examined on a rule to rescind the appointment, but were not grounds for an appeal suspending it. *State ex rel. Algiers Brewing Co. vs. Judge*, 46 A. 100. (See *State ex rel. Gaiser vs. Judge*, *id.* 110; *State ex rel. Fox & Searles vs. Judge*, *id.* 114; *State ex rel. Feldner vs. Judge*, *id.* 116, for further discussion of this subject.) This ruling is adhered to in *Harrod vs. Sewerage Co.*, 49 A. 1595, but in *Metropolitan Bank et als. vs. Commercial, etc., Manufactory*, 48 A. 1383, the court held that a suspensive appeal would lie from a judgment appointing a receiver, basing its opinion on the fact that such a judgment was not one of those enumerated in Art. 580 from which suspensive appeal would not lie. The REASON FOR THE DISTINCTION made does not appear in the REPORT of either of the last two mentioned cases, but is made clear in *re Moss Cigar Co., Ltd.*, 50 A. 789, at 793, where the court entertained the appeal. It was held that in those cases (*i. e.*, *Algiers Brewing Co.* and the *Harrod* case) questions of fact existed, necessary to the determination of the issue, requiring proof and necessitating the production of evidence. The appeals direct did not and could not “bring up the facts,” and it was pointed out that in such cases a motion in the lower court to vacate the appointment was the proper proceeding, and from a judgment on the motion, an appeal might be prosecuted, and the appeal would then bring up the facts as adduced at the trial of the motion.

A judicial sequestration issued against a corporation, subsequently a receiver was appointed for it. Held, that the order appointing the receiver, though an interlocutory decree, was appealable since the appointment might thereafter injure the defendant corporation. This was held on the motion to dismiss the appointment. On the merits, the appointment was vacated, it appearing that it had been made *ex parte*. *Mestier vs. Chevalier Pavement Co.*, 51 An. 144.

See Act 159, 1898, p. 312, relating to appointment of receivers.

See *State ex rel. Williams vs. Judge*, 51 A. 161.

The Bond Required.

A suspensive appeal from an order of seizure and sale should be granted only where appellant furnishes an appeal bond in the sum required by this article. When he furnishes one for a smaller sum, the court below may dismiss the appeal; and where the court below refused to pass on the question, writs of mandamus, etc., will issue. *State ex rel. Feibleman Sons & Co. vs. Judge*, 45 A. 1426.

The corporation may appeal suspensively from an order directing its receiver to sell its property, upon giving a bond sufficient to cover costs of appeal. It can not be required to furnish bond to cover damages that may accrue pending the appeal. The court pointedly says it does not decide that there is right of appeal in such cases, the question not being presented. *State ex rel. Algiers Brewing Company vs. King*, Judge, 46 A. 490.

One judgment was rendered in the suit, but in it different sums were allowed different appellees. Held, that a bond for each appellee exceeding the amount awarded by one-half, was a compliance with law, nor is the bond made invalid by "or" for "and." *Bickham & Son vs. Hutchinson & Bailey*, 50 A. 765.

A suspensive appeal will lie at the instance of the State, from a judgment DECREESING THE CHARTER OF A CORPORATION null and void upon appellant furnishing a bond for costs alone. *State ex rel. Columbia Debenture Co., Ltd., vs. Judge, etc.*, 51 A. 466.

A bond for suspensive appeal must be one-half over the amount of judgment and interest; ONE FOR \$3850 IS INSUFFICIENT where one-half over judgment and interest is \$3398.12. *Woodville vs. Klasing*, 51 A. 1059.

A suspensive appeal will lie from an order DISSOLVING AN INJUNCTION ON BOND, and the trial court should fix the amount of the bond, and where devolutive and suspensive appeal is granted, and the bond for the first fixed at \$100, and for the other, "according to law," one-half over and above the amount named, *i. e.*, \$100, is sufficient for suspensive appeal. The injunction bond protected defendants. *State ex rel. Hake vs. Judge*, 52 A. 103; but see 51 A. 1889.

A bond of appeal which neither in its caption or recitals mentions the title or number of the suit in which the judgment appealed from was rendered, nor its amount or character of the suit, nor the court in which it had been pending, is not a valid bond. *Thibodeaux et al. vs. Thibodeaux*, 45 A. 1126.

Of the Surety on the Bond.

Where three parties ARE JOINED AS PLAINTIFFS, and judgment going against them, ONLY ONE APPEALS, the other two are not competent sureties, because under our law they were appellees. Appeal dismissed. *Barrow et al. vs. Clack*, 45 A. 478.

An appeal bond signed by one in his PERSONAL CAPACITY, is not a compliance with an order of appeal granted him as administrator, from a judgment RENDERED AGAINST HIM IN HIS FIDUCIARY CAPACITY. *Thibodeaux et al. vs. Thibodeaux*, 45 A. 1126.

A judicial surety must have sufficient property within the State to satisfy the obligation and liable to seizure. *State ex rel. Gondrian vs. Judge*, 48 A. 455.

A judgment annulling a will and recognizing the heirs, but not putting them in possession, may be suspensively appealed from on bond fixed by the court *a qua*, and one of two executors, appellants may be surety for a legatee. Succession of Meunier, 52 A. 79.

A motion to dismiss an appeal, because no appeal bond is given, must be filed within three judicial days after the transcript is filed (civil case.) State vs. Callac, 45 A. 27.

Act 41, 1894, is not unconstitutional, and a bond company is a legal surety. Standard, etc., Co. vs. Matheson, 48 A. 1321.

What will be reviewed.

An appeal by the garnishee from a judgment rendered and signed on a certain day, does not bring up for review the decree *pro confesso* taken against him; where the decree in garnishment proceedings, though rendered on the same day as the judgment regularly signed, was yet a separate decree which was never signed. Union National Bank vs. Hyams, 50 A. 1110.

On an appeal from an order of seizure and sale only the legality of the order can be inquired into. Any irregularity of the notice or three days demand may afford ground for injunction of the order, but can not be the subject of an appeal. Germania Savings Bank vs. Lemle, 50 A. 1289.

The appellee had obtained the dismissal of the suspensive appeal in the District Court on the ground that the bond was insufficient in amount. To the appeal FROM THE JUDGMENT DISMISSING THE APPEAL the appellee answered praying that the original judgment be increased, or if this was not granted, for ten per cent. damages for frivolous appeal. Held, that the District Court had jurisdiction to dismiss the appeal, and that appeal from the judgment DISMISSING THE APPEAL did not bring up for review the original judgment, nor the issue whether appellee's answer, was waiver and abandonment of his motion to dismiss. Woodville vs. Klasing, 51 A. 1057. See Carrol vs. Carrol, 50 A. 835.

Jurisdiction of Court Below, After Order of Appeal.

After an appeal has been taken and bond signed, the court below is without power to accept a second bond. Barrow et al. vs. Clark, 41 A. 478. The "insufficiency" of the surety must be tested in the court *a qua*; "legal incompetency" in the appellate court. *Ibid*.

An order of appeal conditioned on giving bond according to law is not complied with by filing a bond for — hundred dollars. The court *a qua* retained jurisdiction, and had the power to grant a devolutive appeal on the dismissal of the first, which must be considered a suspensive appeal. McQuirk vs. Marchand, 45 A. 732.

Where an order for a suspensive appeal was granted, but the bond not filed within the legal delays—the appellant on dismissal in the court *a qua* of his suspensive, may obtain a devolutive appeal. Failure to file bond is not an abandonment of the appeal. *State ex rel. Mineral Springs Company vs. Judge*, 49 A. 1527.

The bond for a devolutive appeal had been adjudged not good in the court below and time given to furnish another. The transcript having been filed in the Supreme Court, and a new bond not having been furnished, the appeal was dismissed. *Stewart vs. Cattle Company et al.*, 50 A. 845.

Where the order was for suspensive appeal alone and a bond according to law, and the bond given was insufficient in amount, the court *a qua* had jurisdiction to dismiss the appeal, and the order will not support a devolutive appeal. *Woodville vs. Klasing*, 51 A. 1057.

The court from whose judgment an appeal is taken has the right to decide whether the conditions—*i. e.* sufficiency of bond, etc.—on which he granted the appeal have been complied with, and where a rule is taken to have the appeal declared devolutive and not suspensive, prohibition will not issue to restrain the judge from deciding the issue. *State ex rel. Schwan vs. Judge and Sheriff*, 51 A. 1842.

Miscellaneous Cases in Which the Appeal Was Entertained or Dismissed.

The law does not warrant A SIMULTANEOUS APPEAL in the same case to both this and the Circuit Court. The appeal to the Circuit Court having been made returnable and filed before the appeal was returnable to this court, the latter will be dismissed, without prejudice to right of new appeal if the Circuit Court shall decline or be denied jurisdiction—overruling. *Henry vs. Tricou*, 36 A. 520; *Frelbery Bros. et al. vs. Langfelder*, 45 A. 983. But see *Bennet vs. Her Creditors*, *Id.* 1019.

Pending an appeal to the Supreme Court from an order OF SEIZURE AND SALE, an INJUNCTION was obtained and also appealed. Both appeals were “argued and SUBMITTED SIMULTANEOUSLY,” and the injunction suit decided. Held, that the first appeal must be dismissed. *The American, etc., Co. vs. the Heirs, etc., of Williams*, 47 A. 1380.

When in an insolvency proceeding an order of appeal is granted TO THE CIRCUIT COURT on the order for a meeting of the creditors, AND ONE TO THE SUPREME COURT in opposition to proceedings of the meeting, the appeal to the Supreme Court will not be dismissed. *Pinski vs. Resweber*, 49 A. 246.

A devolutive appeal from a judgment approving a syndic's account will not be dismissed, because the court *a qua* discharged the syndic pending the appeal. *Hamilton vs. Creditors*, 51 A. 1035.

Where a motion to dismiss a devolutive appeal is renewed at the hearing of the merits, and the motion INVOLVES A QUESTION OF FACT, the

CASE WILL NOT BE REMANDED, if it appears that the appellant would NOT BE ENTITLED TO A REVERSAL. *Ibid.*

A motion to dismiss an appeal will be denied, where the grounds are that proper parties were not before the court, or that appellant has acquiesced in the judgment, or where there has been no citation of appeal. *Cockerham vs. Bosely*, 52 A. 65.

FAILURE TO FURNISH BOND FOR COSTS ORDERED in the court ~~may~~ may be ground for dismissal of the suit there, but can not be urged as cause for dismissal of the appeal. *Aiken vs. Robinson, etc.*, 52 A. 95.

A motion to dismiss an appeal taken by a corporation, alleging that the corporation had been dissolved, will not be entertained where it appears that the dissolution—to the knowledge of mover—was had before the judgment appealed from was rendered. *Nash vs. Canal & R. Co.*, 52 A. 1199.

Art. 578. Devolutive Appeal—

Where a bond **FIXED BY THE COURT** is not sufficient for a suspensive, it must be sustained as a devolutive appeal. *Michenor et al. vs. Trustees*, 49 A. 360; *Stemple vs. Fulton et als.*, 51 A. 468.

The dismissal of the suspensive appeal because of **INSUFFICIENCY OF THE BOND** does not deprive appellant of the right to a devolutive appeal. He should, however, obtain an order therefor. *Woodville vs. Klasing*, 51 A. 1057.

A suspensive appeal will not be dismissed where appellant has furnished bond **IN THE SUM FIXED BY THE COURT**. Though not good as a suspensive, it will stand as a devolutive appeal. *Weil vs. Schwab*, 51 A. 1547.

The order for appeal was for one hundred dollars for devolutive, according to law "based on the amount set out in plaintiff's petition for suspensive appeal. Appellants gave bond for one hundred dollar and asked for an injunction to restrain execution of judgment appeal from. The writ was refused. Held, that prohibition and mandamus would not lie directing the issuance of the writ. That appellants' remedy was to have order for appeal corrected; until corrected the bond given was for devolutive appeal. *State ex rel. Schwan vs. Judge et al.* 51 A. 1889; but see *State ex rel. Hake vs. Judge*, 52 A. 103.

Art. 579. Terms and Conditions of Appeal Bond—

Where the appeal bond does not contain the stipulation that appellant will prosecute the appeal, it will be dismissed. *Ross & Hollingworth vs. Their Creditors*, 45 A. 442; *Prudhomme vs. Williams*, *id.* 484.

An appeal will not be dismissed because the bond does not mention the residence of the surety. No objection having been made to it

qualification of the surety in the court below, we will presume that he was a good and sufficient surety, both as to solvency and residence—nor is the bond defective because it omits to state, that the surety will be liable in default of the principal—that is the obligation which the surety assumes in signing the bond. *Northrup vs. Sullivan et al.*, 47 A. 715.

An appeal bond is valid, though the name of the clerk of court was not inserted. *Gaudet vs. Dumorten*, 49 A. 984.

The insertion of the words "in said Supreme Court" in an appeal bond does not invalidate it. *Derouen vs. Hebert et als.*, 49 A. 1079.

A devolutive appeal bond, containing the condition "to satisfy the judgment which may be rendered," secures the costs and will sustain the appeal. *Stevenson vs. Short et. al.*, 52 A. 967.

Art. 580. No Suspensive Appeal Lies—When

A rule taken under Act. 134 of 1888 on a debtor who had obtained a respite to show cause why he should not make a cession, was made absolute and a provisional syndic appointed, etc. Held, that no suspensive appeal would lie therefrom. *State ex rel. Ziegler vs. Taylor*, Judge, 46 A. 932.

See annotation to Art. 575—Subhead "When appeal lies," *et seq.*

Art. 581. Citation of Appeal.—

A rule was taken to cancel certain mortgages and inscriptions for taxes due the city of New Orleans and the State. The mortgagee and city and State were made parties, and the mortgage ordered canceled and the taxes paid. The mortgagee appealed and prayed that plaintiff in rule be cited. Appellee moved to dismiss because all parties were not before the court. Motion denied because all parties interested had been cited. The State and city were no longer interested, it appearing the taxes had been paid. *Denègre vs. Mushet*, 46 A. 90.

An appeal will not be dismissed on account of failure to cite the appellee, where the petition for appeal asks and order was made for citation, and the want thereof is not imputable to appellee. In such a case the court will grant a reasonable time to make proper parties by citation. *Cockerham vs. Bosely*, 52 A. 65.

See annotation to Art. 1135 as to effect on appellant's right to issue or correct citation when transcript is filed before return day.

Art. 583. Citation of Appellee—Time Allowed.—

"The appellee must be cited to appear before the court of appeal at its next term or return day for the parish, if there be sufficient time for doing so after allowing a delay of fifteen days from date of service of

citation, or from the date of adjournment of court when the appeal has been granted in open court; and if there be not sufficient time to admit of the appellee having this delay, he shall be cited to appear before the court of appeal at the subsequent term or return day. (As amended by Act 6, 1896, p. 7.)

Art. 585. Preparation of Transcript of Appeal—

After an appeal has been perfected, the appellant has the right at any moment to have THE CLERK MAKE UP THE TRANSCRIPT, and the clerk must comply with the demand within a reasonable time. This right will be ENFORCED BY MANDAMUS, but the perfecting of an alleged defective transcript can not be obtained by this writ. *State ex rel. Comeaux*, 46 A. 1291.

The clerk of court must embody in the transcript of appeal THE ORIGINAL REPORT of the testimony without charge, even though there be no copy thereof in the record (*State ex rel. Bayhl et al. vs. Clerk*, 33 A. 819); and a rule of court directing that the original of the evidence shall remain in the record, must yield to the law. *State ex rel. Legendre vs. Clerk*, 47 A. 358.

The clerk's certificate to a transcript that it contains all the evidence etc., OBVIATES A STATEMENT OF FACTS or assignment of errors, and the transcript contains no evidence of any kind, the case will be remanded. *Harrison & Bro. vs. Soulabere*, 52 A. 707.

Defective Transcript, etc.

When pending a motion to dismiss, imperfections in the transcript were cured by order of Court—the motion will be overruled. *Bryan vs. Murdock*, 45 A. 935.

The failure of one appellant to file a document relating to his case will not work the dismissal of the appeal of another appellant. *Succession of Stuart*, 48 A. 1484.

An appeal will not be dismissed because of diminution of the record where it appears that the missing documents ARE ON FILE IN THE COURT, and have, by motion in this Court, been made part of the record here. *Woodlief vs. Logan et al.*, 51 A. 1931.

An appeal will not be dismissed on motion, because of insufficiency of data upon which the appellate court would be justified in affirming or amending the judgment appealed from, or of insufficiency of transcript—the Court may, however, do so after a hearing. Documents not filed below but included in the transcript will not be noticed. *Succession of Fortier*, 51 A. 1562.

A case will be remanded for a new trial where the appellant is made WITHOUT FAULT OR NEGLIGENCE OF HIS OWN, to bring up the complete record. *Dauchite Lumber Co. vs. Lane & Bodley Co.*, 52 A. 1937.

See Arts. 896, 897, 898.

Art. 587. Transcript Must be Filed on Return Day— Extension—

When an extension of time has been allowed appellant to file his transcript, he is not entitled to three days' grace from the expiration of the extension. *Archer vs. Gonsoulin*, 46 A. 144; *Gegand et al. vs. City et al.*, 52 A. 1259.

If the transcript of appeal is filed on the return day FIXED BY THE COURT BELOW, the appeal is timely, though more than a year has elapsed since the judgment was signed or became final. *Comeau vs. Miller*, 46 A. 1324.

The trial judge had the legal discretion to fix a different return day than that named by law, IF MORE TIME BE REQUIRED to prepare the record for appeal, and the statement of the judge in the order to this effect is sufficient. *Succession of McCan*, 49 A. 968.

When the extended return day falls on a *dies non*, appellant has the whole of the next day thereafter to file the transcript. *Metropolitan Bank vs. Aarons, Mendelsohn & Co.*, 50 A. 1047.

An extension of time for the filing of a transcript granted ON MISINFORMATION SUPPLIED BY APPELLANT or his counsel will be revoked, if it appears that the court would not have granted the order had it been correctly advised. *Thibodeaux vs. Cayard*, 52 A. 1374.

An extension of the return day for filing a transcript of appeal will only be granted WHEN SEASONABLY APPLIED FOR and on sufficient grounds. An extension can not be had after the return day, on an affidavit of the clerk of court alleging inability to complete, because of illness, etc. *LeBlanc et al. vs. Lemaire et al.*, 52 A. 1635.

See Arts. 883, 884, 885.

See annotation to Art. 1135—effect of filing transcript before return day.

ACT 92, 1900—Relative to appeals in civil cases to the Supreme Court and providing for return days therein, the parish of Orleans excepted.

SECTION 1. *Be it enacted by the General Assembly of the State of Louisiana*, That the judges of the District Courts throughout the State, the parish of Orleans excepted, shall fix the return days in all civil cases appealable to the Supreme Courts, provided that the judge shall fix the return day in the order granting the appeal, which shall not be less than fifteen nor more than sixty days from the date of the orders, except by consent of parties.

SEC. 2. *Be it further enacted, etc.*, That all laws or parts of laws in conflict herewith are and the same are hereby repealed, and that this act shall take effect from and after its passage.

Art. 588. Failure to File Transcript—

The failure to file transcript IS AN ABANDONMENT of the appeal, and warrants the dismissal of an appeal subsequently obtained. *Mutual Loan, etc., Assn. vs. First African Church*, 49 A. 880.

Failure to file the transcript on the return day, or within the three judicial days thereafter, has always been taken as the **ABANDONMENT OF THE APPEAL**. *State vs. Louisiana Debenture Co.*, 52 A. 551. ("Judicial days" is the expression used by the court in the syllabus, and the opinion shows that only judicial days were considered.) See *Same vs. Same*, *Id.* 597 *Rosetta, etc. Co. vs. Adler*, *Id.* 689.

See Arts. 883, 884, 885.

When Motion to Dismiss May be Made—

The three days' grace allowed for the return of appeals will not be granted where the return day has been extended. A motion to dismiss for such a cause is timely, though made more than three days after filing of the transcript. *The Mutual Loan, etc., Assn. vs. First African Baptist Church*, 48 A. 1458.

An appeal made returnable according to law is returnable on the first return day after the order, and where the bond for devolutive appeal is not filed until after the return day so established, the appeal will be dismissed and the motion to dismiss may be made at any time. *Coudroy et al. vs. Pecot et al.*, 51 A. 495; *Gegaud et al. vs. City*, 52 A. 1260.

A motion to dismiss an appeal on the ground that the transcript was not seasonably filed, may be made after three days following the filing. *Le Blanc et al. vs. Lemaire et al.*, 52 A. 1635.

See Art. 886.

Art. 591. Appearance and Answer of Appellee.

The failure of an appellee to file his answer at the proper time will prevent its consideration. *Flower et als. vs. Myrich*, 49 A. 391.

One of several appellees by answering an appeal, may have the judgment appealed from amended, if it does not affect his co-appellee. *Smith Bros. & Co., Ltd., et al. vs. Athens Lumber Co.*, 49 A. 665.

When the appellee has consented to fix the case for hearing before an appellate court, he can not move for the dismissal of the appeal because of defective citation. *State ex rel. Broussard vs. Judge*, A. 1562. (See Arts. 886 to 891.)

An answer to an appeal, attempting to inject into the case new issues of fact not tried in the court *a qua*, and the brief in support of it, may be ordered withdrawn from the files. *Succession of Trouilly*, 52 A. 276. See Arts. 888, 889, 894.

Art. 594. No Withdrawal of Appeal.

When the jurisdiction of the appellate court has attached to an appeal or a brief in support of it can not be withdrawn by the appellant without the consent of the appellee and of the court. *Succession of Trouilly*, 52 A. 276.

Art. 602. Statement of Facts.—

If in an appeal, where the testimony has not been taken down and a **STATEMENT OF FACTS** is substituted, it appears that the application for the statement has not been made seasonably, the judgment appealed from will not be disturbed, nor will the case be remanded, when the application for the statement was made to the judge nearly a year after judgment. *Nicholls vs. Bienvenu et als.*, 47 A. 355.

Two statements of facts by the judge below were found in the record, and there was **DISPUTE AS TO WHICH CONTROLLED**. Held, the case would be remanded. *Town of Mandeville vs. Baudot*, 48 A. 248.

A statement of facts comes too late if made out **AFTER AN ORDER OF APPEAL** had been granted and appellant had filed his bond. *Theus vs. Kemp*, 49 A. 1850.

A motion to dismiss on the ground that the statement of facts was made after the appeal was obtained must be made within three judicial days after filing of the transcript. *Brown et al. vs. Pontchartrain Land Co.*, 49 A. 1779.

See Art. 896.

Art. 604. Nullity of Judgment.—

The nullity of a judgment can not be set up as a defense to a suit to revive the judgment. *Bruno vs. Oviatt*, 48 A. 471.

Art. 605. Causes of Nullity. Article 606, Vices. Art. 607, Fraud, Etc.

An action for nullity will not lie because the judgment attacked was decided by the court more than thirty days after submission, and was contrary to law and evidence. Exception of no cause of action was properly maintained. *Landry et als. vs. Administratrix*, 48 A. 48.

A District Court may annul a judgment rendered by the Court of Appeal when it appears that the judgment of the appellate court is an absolute nullity upon the face of the papers, the court being without jurisdiction *ratione materiæ*. *Hibernia Nat. Bank vs. Standard, etc., Co.*, 51 A. 1321.

Art. 608. Nullity May be Demanded from Trial or Appellate Court.—

Where it is alleged that a justice of the peace has rendered judgment without notice of trial, a district judge may issue mandamus to compel the justice to grant an injunction to restrain an execution thereunder. *State ex rel. Moyse Brothers vs. Judge*, 50 A. 492.

On appeal from a judgment rendered by a justice of the peace, the District Court, where it has jurisdiction *ratione materiæ*, may pass upon

the nullity of the judgment, when the nullity is apparent on the face of the record—and it may at the same hearing dispose of both the assigned errors and the merits. *State ex rel. Guarneri vs. Judge*, 32 L. 384.

See annotation to Art. 605.

Art. 641. Writ of Fieri Facias.—

A single writ of *fieri facias* may issue to execute two judgments rendered against different defendants at different times in the same case. *Truxillo vs. Delaume et al.*, 47 A. 10.

Execution may issue before the expiration of time for suspensive appeal. An appeal will invalidate it at the cost of the judgment creditor, who may be held for any damage caused. And the writ may be returned *nulla bona* when it is evident that the defendant has no assets subject to levy. *Wheeling Pottery Company vs. Levi & Co.*, 48 A. 77.

Art. 642. Garnishment.—

Where the garnishee is negligent and permits a judgment *pro confesso* to be entered against him, he can not have the judgment set aside by an action in nullity. *Warren vs. Copp*, 48 A. 810.

The garnishee should except to a traverse of his answers, when the object of the traverse is to adjust accounts which the seizing creditor alleges exist between his debtor and the garnishee. The garnishee ought not incidentally be forced into a long, complicated defense of himself. *Limenet vs. Fourchy*, 51 A. 1299.

The garnishee, interrogated as to his relations with one other than the judgment debtor, can legally except thereto. The proceeding must be limited to ascertaining the indebtedness of the garnishee to the judgment debtor. *First Bank of Natchez vs. Moss et al.*, 52 A. 170.

See annotation to Art. 246.

Art. 643. What Property May Be Seized.—

Title to an immovable, held under a conveyance valid on its face and accompanied by delivery and possession, can be attacked by a direct action only. A creditor of the possessor's vendor CAN NOT DISSESS THE CONVEYANCE and seize the property as belonging to his debtor. *Weathers vs. Sheriff et al.*, 52 A. 932.

Art. 644. Exemption from Seizure.—

Act 79, 1876, p. 123.—To amend article six hundred and forty-four of the Code of Practice; to repeal all laws contrary to or in conflict with this act and all laws on the same subject matter; the amendment of article six hundred and forty-four of the Code of Practice; to fix penalties for the violation of this act, and to fix the limits of this act and the interpretation to be given to it.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened,* That articles six hundred and forty-four of the Code of Practice be so amended as to read as follows: "The sheriff or constable can not seize the linen and clothes belonging to the debtor or his wife, nor his bed, bedding or bedstead, nor those of his family, nor his arms and military accoutrements, nor the tools and instruments, and books, and sewing machines necessary for the exercise of his or her calling, trade or profession by which he or she makes a living; nor shall he in any case seize the rights of personal servitude, of use and habitation, of usufruct to the estate of a minor child, nor the income of dotal property, nor money due for the salary of an officer, nor laborer's wages, nor the cooking stove and utensils of said stove, nor the plates, dishes, knives and forks and spoons, nor the dining table and dining chairs, nor wash tub, nor smoothing irons and ironing furnaces, nor family portraits belonging to the debtor, nor the musical instruments played on or practiced on by any member of the family.

SEC. 2. *Be it further enacted, etc.,* That any person offending against the provisions of this act, or who shall by any artifice or subterfuge induce or procure another to sign away, by contract or otherwise, any of the rights which he or she may have under this act, shall be deemed guilty of a misdemeanor, and on conviction shall be fined in a sum not exceeding two hundred dollars, or imprisonment for a term not exceeding six months, or both, at the discretion of the court.

SEC. 3. *Be it further enacted, etc.,* That all laws or parts of laws conflicting with this act or contrary to any of its provisions, and all laws on the same subject matter, the amendment of Article six hundred and forty-four of the Code of Practice be and are hereby repealed.

SEC. 4. *Be it further enacted, etc.,* That the repealing clause of this act shall not be construed or interpreted so as to affect the exemption of the homestead, the widow's one thousand dollars, nor the rural and agricultural exemptions now in force by existing laws, it being the true meaning and intent of this act that those exemptions should not be affected by this act.

In *Benton vs. Jarette* (No. 2136) the Court of Appeal for the parish of Orleans held: That this act does not affect the exemption between lessor and lessee, under R. C. C., Art. 2705. It was argued that the act of 1876 did more than amend Art. 644, C. P., and even if did only that, yet the Code of Practice should obtain when conflicting with the Civil Code (R. S. 3990), but the court held otherwise. The case was carried to the Supreme Court, June, 1900, on *certiorari* (Const., Art. 101), but without avail. The opinion is not reported.

See Annotation to Art. 647, and see Const. 1898, Arts. 244-247.

Art. 647. Seizure of Rights, Credits or Money—

The salary of the clerk of the Sixth Recorder's Court, and wages or recompense for personal service, are exempt from seizure. *Mott vs. Sblsa*, 51 A. 290.

Art. 656. Seizure of Houses or Lands Includes Rents, etc.—

The purchaser of property at a foreclosure sale, is without right to sue for the value of timber alleged to have been taken by defendant, while the property was under seizure, *Frank vs. Magee*, 60 A. 1066.

Art. 668. Advertisement of Judicial Sales, etc.—

Act 91 of 1876, printed in body of book, is specifically repealed by Act 49, 1877, Section 20, p. 62. Sections 1 to 14 and Section 19 of the act of 1877 relate to public printing, and are superseded by later acts.

Sections 15, 16, 17 and 18 (the latter as amended by Act 82, 1900, p. 131) are given below:

Act 49 of 1877, p. 62.

SEC. 15. ORLEANS.—That in the parish of Orleans, where advertisements are required to be in relation to judicial proceedings, or in the sale of property under judicial process, or in any other legal proceeding of whatever kind, they shall be published in a daily newspaper published in the English language, and which shall so have been published as a daily paper for at least one year prior to the insertion of said advertisement or publication; said newspaper to be selected by the defendant or party charged with the conduct of the proceedings; *provided*, the defendant shall make the selection within three days of the service of notice of seizure or process on him. Should the defendant neglect to select, the plaintiff shall have the right to do so; and should neither plaintiff nor defendant select, nor the party invested by law with the direction of the proceedings, then the sheriff, constable, clerk or other officer, as the case may be, shall select. The newspaper so selected shall publish said advertisement in a conspicuous manner, and every advertisement to be in the column or columns and all under a prominent title in capitals, to-wit: Judicial Advertisements. Should there be no newspaper published in said parish as aforesaid, said advertisement may be posted as now provided by existing laws.

SEC. 16. OUTSIDE ORLEANS.—That in all parishes of the State outside the parish of Orleans, where advertisements are required to be made in relation to judicial proceedings, or in the sale of property under judicial process, or in any other legal proceeding of whatever kind, they shall be published in an English newspaper printed in the parish in which the proceedings are carried on; and if there be no newspaper published in the parish, the advertisements shall be made by posting them at or near the front door of the court house, or the place used as such, and at two other public places in different parts of the parish; *provided*, that as regards judicial and legal advertisements under publication when this act becomes operative, the previous sections of this act shall not affect the same, but it shall be legal to continue the advertisements in the paper in which they are being published, or in any other daily newspaper published in English in said parish for the balance of the time during which such advertisements should respectively have to be continued to complete the same according to law.

SEC. 17. SELECTION OF PAPER.—That where there are two or more newspapers published in the parish, the defendant or party invested by law with the direction of the proceedings shall have the right of selecting the newspaper in which the advertisement is to be made, if applied for within three days after notice of such proceedings, or the seizure made under the process. Should the defendant neglect to select, the plaintiff shall have the right to do so; and should neither plaintiff nor defendant select, nor the party invested by law with the direction of the proceedings, the sheriff, constable, clerk or other officer charged by law with the carrying out of the proceedings shall select.

SEC. 18. COST OF ADVERTISEMENT.—That the costs of such advertisements shall not exceed in the parish of Orleans the rate of seventy cents per square, or fraction thereof, for each insertion: and

in the other parishes one dollar per square, or fraction thereof, for the first insertion, and fifty cents for each subsequent insertion.

One square to consist of the space of one hundred words solid matter.

If such newspaper refuses to publish at the rate herein specified, the advertisements shall be published in the manner above provided for in cases where there are no newspapers. (As amended by Act 82, 1900, p. 131.)

Publication in French.

Act 125, 1888, p. 186.

AN ACT to amend and re-enact Act No. 38 of the General Assembly of 1880, approved March 16, 1880, entitled "An Act to regulate judicial advertisements in the French language in the parish of Orleans, under the provisions of Art. 154 of the Constitution," and to place judicial advertisements in the French language on the same basis as judicial advertisements in the English language in the said parish.

SECTION 1. That Act No. 38 of the General Assembly of 1880, entitled "An Act to regulate judicial advertisements in the French language in the parish of Orleans, under the provisions of Art. 154 of the Constitution," be amended and re-enacted to read as follows: That in the parish of Orleans, where advertisements are required to be made in relation to judicial proceedings, or in the sale of property under judicial process, or in any other legal proceeding of whatever kind, they shall be published, also, in a newspaper of good standing and of good financial basis, published in the French language, which shall have been in existence as a daily or weekly newspaper for at least one year, and which shall be published regularly as a daily newspaper at the time of the insertion of the said advertisement or publication.

The said newspaper to be selected by the defendant or party charged with the conduct of the proceedings; *provided*, the defendant shall make the selection within three days of the service of notice of seizure or process on him. Should the defendant neglect to select, the plaintiff shall have the right to do so; and should neither plaintiff nor defendant select, nor the party invested by law with the direction of the proceedings, then the sheriff, constable, clerk or other officer, as the case may be, shall select. The newspaper so selected shall publish said advertisement in a conspicuous manner, each and every advertisement to be in the column or columns and all under a prominent title, in capitals, to-wit: Judicial Advertisements. Should there be no newspaper published in said parish as aforesaid, said advertisements may be posted as now provided by existing laws.

SEC. 2. That said publication in the French language shall be made in precisely the same manner and for the same number of times, and on the same terms, as by existing laws are required or may be required thereafter for the publication of judicial advertisements in the English language.

SEC. 3. That all laws and parts of laws in conflict herewith, and on the same subject matter, be and the same are hereby repealed, and that this act shall take effect from and after its promulgation.

Number of Insertions.

Act 104, 1878, p. 157.

AN ACT relative to judicial advertisements in the parish of Orleans.

SECTION 1. That judicial advertisements shall be made by publication in a daily paper on three different days before the expiration of the

term fixed by law, if the term be of ten days; and for those advertisements for which the term of thirty days is fixed, it suffices if they are published in a daily paper once a week during that term.

SEC. 2. That all laws and parts of laws conflicting herewith be and are hereby repealed.

Want of thirty clear days' advertisement is an informality cured by the prescription of five years. *Robinson vs. Williams*, 45 An. 486.

See C. P. 655, 667, 670, 968, 969, 991, 1140.

11th March to 11th April give 30 clear days. *Suc. of Byrne*, 38 A. 511.

Sundays are properly included in computation of the time necessary for the advertisement of the sale of immovables. *Schenk et al. vs. Schenk et al.*, 52 A. 2102.

Art. 670. Time Required for Advertisement of Sale of Seized Property—

Sundays are properly included in the computation of the time necessary for the advertisement of the sale of immovables. *Schenk et al. vs. Schenck et al.*, 52 A. 2102.

Art. 724. Privilege by Sequestration, etc.

"The terms *provisional seizure* in the article [724] being an erroneous translation and intended for *attachment*." *Beck vs. Brady et al.*, 6 A. 444. See Art. 732.

Art. 732. Executory Process—

The mortgagee who pays an insurance premium not in excess of the amount stipulated in the act of mortgages, may include it in the amount for which an order of seizure and sale is obtained. *Germania, etc. Bank vs. Lemle*, 50 A. 1289.

The demand of the plaintiff in executory proceedings must be supported by authentic evidence, and can not be eked out against an enjoying claimant of a part of the property, by the assertion of rights against him not so supported, or by estoppel not set up in the answer to the injunction. *Bonnecaze vs. Lieux*, 52 A. 285.

Art. 735. Notice to Mortgage Debtor—

"In obtaining this order of seizure, it shall suffice to give three days' notice to the debtor, counting from that on which the notice is given. If he resides on the spot, adding a day for every twenty miles between the place of his residence and the court house in the parish where the petition has been presented." (As amended by Act 41, 1898, p. 46).

The holder of a mortgage containing the *pact de non alienando* may proceed without notice AGAINST THE VENDEE of the mortgagor, in the rights of the holder are not restricted by the vendee's assent.

tion of the mortgage indebtedness. The holder of any mortgage may proceed *via ordinaria*. Truxillo vs. Delaune et al., 47 A. 10.

After the death of the mortgage debtor, and before appointment of administrator, executory process was applied for, but NOTICE OF SEIZURE WAS NOT SERVED. Subsequently an administrator was appointed and obtained an order of sale in the succession proceedings. On rule taken by the mortgage creditor to set aside the order, it was held that notice of seizure not being served, the proceedings by the mortgage creditor were without legal effect. Succession of Haile, 52 A. 1529.

Art. 737. When Debtor Absent—Attorney to Represent Him—

The court to which application is made by a resident of another State or executory process has jurisdiction *ratione personæ* to issue its writ joining the seizure and to appoint a curator *ad hoc* to represent the absent defendant in injunction. Phillips et al. vs. Adams Mach. Co., 53 A. 442.

Art. 738. Injunction of Executory Process—Art. 739. Causes For.

Injunction—with or without bond—to restrain executory process, will issue only in the specific cases mentioned in Art. 739. It will not lie here the ground alleged is that the order for the process was issued without the complete authentic evidence required by law. The contention that the administrator of the debtor's estate is not the "debtor" mentioned in the article is without force. Anderson vs. Dupre, Admr., 5 A. 1134.

The injunction, without bond, of executory process, is restricted to the uses prescribed by this article, and the amount demanded by the mortgagee; and if the amount of the notes on which process issued is less than the jurisdictional limit of this court, the appeal will be dismissed, though opponent claim a larger sum from one not before the court. Koch vs. Godchaux, 46 A. 1382.

Where the averments of the petition for injunction are contradicted by the documents annexed thereto, an injunction is properly refused. *Re ex rel. Noble et al. vs. King*, Judge, 47 A. 229.

An injunction will not lie to restrain a writ of seizure and sale because it is prematurely issued, and before the expiration of the legal delays on the mortgage debtor. *Heirs of Williams vs. Sheriff et al.*, 47 A. 7.

"Failure of consideration" will support the injunction of an executory process. *Phillips et al. vs. Adams Mach. Co.*, 52 A. 442.

Art. 755. Summary Trials in Certain Cases—

A rule of court excluding ordinary cases from trial on certain days does not necessarily apply to summary cases, and the court may try an ejectment suit on days consecrated to civil jury cases. *Ricou vs. Hart*, 47 A. 1870.

When one member of a copartnership, without consulting the other members, asks for a respite from the creditors of the firm, and the other members deny the necessity for respite, and declare themselves willing to pay all claims, it is proper practice to try the issue presented by those members on a rule to show cause why the preliminary order should not be set aside. *Schminke & Newman vs. Their Creditors*, 50 A. 511.

See annotation to Art. 546.

Art. 765. Constable May Act for Sheriff—

Constables may, as such, and within the parish, act for the sheriff in criminal cases. *State vs. Devall*, 51 A. 497.

Art 791. Habeas Corpus—When it Will Issue—

After verdict and before sentence, the District Attorney suggested doubts OF THE SANITY OF THE ACCUSED, and the court ordered an investigation. Held, that HABEAS CORPUS will be denied, as the act of the court was legal and proper. The court, however, maintained the writ for the purpose of reducing the amount of the bail bond. *State ex rel. Chandler, etc.*, 45 A. 696.

Habeas corpus will not lie to review the order of a court committing the manager of a corporation to jail for CONTEMPT OF COURT in failing to obey its order to deliver the funds in his possession to the receiver for the corporation appointed by the court. *State ex rel. Andbert vs. Sheriff*, 47 A. 334.

On application for writs of habeas corpus, the merits of criminal cases will not be reviewed. *In re State ex rel. Cayard et al.*, 53 A. 4.

Habeas corpus will lie at the instance of the mother to bring before the court a minor daughter who is alleged to be detained in a convent. The petition for the writ may be made by any one—even a minor—the name of the person who is confined, and it will run against any one who has a person in actual custody, and is not restricted to those who hold persons "under process." *Prieto vs. St. Alphonsus Convent of Mercy*, 52 A. 631.

Art. 830. When Mandamus Will Issue.—

The Civil District Court (Const. 1879) may issue writs of mandamus prohibition and certiorari in aid of its appellate jurisdiction, although the Supreme Court is vested with general supervisory jurisdiction over inferior courts. *State ex rel. Rocchi vs. Judge*, 45 A. 533.

Mandamus will issue at the instance of the Police Jury to compel a sheriff and ex-officio tax collector to exhibit at his office and within reasonable hours to a committee of the Police Jury, the books and papers of his office necessary for the adjustment of his accounts with the Parish Treasurer. *Scott, Sheriff, vs. President, etc., et al.*, 46 A. 278.

The City Court refused to hear witnesses to establish a claim on the ground that no default had been taken. Pending an application for mandamus to the Supreme Court, an answer was filed. Held, that the writ would not issue, though the witnesses should have been heard when offered. *State ex rel. D'Amico vs. Judge*, 46 A. 365.

The court had ordered garnishees in attachment proceedings to answer in open court. On objection to the order, it was rescinded. Held, that mandamus will not lie to reinstate the order, that it was not a ministerial duty of the judge to order garnishees in proceedings like this to answer in open court. *State ex rel. Sintes vs. Judge*, 49 A. 696.

Mandamus will not lie to compel the municipal authorities of New Orleans to perform any act which would lead up to the payment of judgments out of the order in which the law has declared they shall be paid. *State ex rel. Foy vs. Mayor, etc.*, 49 A. 946.

Mandamus will not lie to coerce the Court of Appeal to reinstate a cause which it has dismissed for want of jurisdiction. *State ex rel. Mutual National Bank vs. Judges, etc.*, 49 A. 1084.

Mandamus will lie to compel the return of the books of a religious corporation to the proper officers. *State ex rel. Immanuel, etc., Church vs. Riedy*, 50 A. 258.

Mandamus will lie to review the refusal of a judge to grant the plaintiff a suspensive appeal from the *ex parte* order allowing a defendant in injunction to bond the writ. *State ex rel. Capital City, etc., Co. vs. Judge*, 50 A. 266.

An executor refused to pay over funds of the succession as ordered, and was PUNISHED FOR CONTEMPT. He paid his fine and served his imprisonment, and when released continued in his refusal. A second rule to punish him for contempt was taken, and *res adjudicata* and *autrefois convict* being pleaded, the district judge dismissed the rule. Held, that mandamus would lie to compel the judge to reinstate the rule and try the case on its merits. *State ex rel. Heffner et al. vs. Judge*, 50 A. 554.

The obligation of the public carrier to receive and transport freight for all persons is imposed by public policy, and may be enforced by mandamus at the suit of a private person. The carrier can not by contract with others, place itself in a position where it is not able to perform that obligation. *Cumberland T. & T. Co. vs. Morgan's L. & T. R. Co.*, 51 A. 29. But the writ will not issue to compel the carrier to

establish a station at any particular point along its route in the absence of such an obligation being imposed on it by charter or general law. State ex rel. Smart vs. Kansas City, etc., R. Co., *id.* 200.

Art. 845 to 854. Prohibition—

Prohibition is NOT A WRIT OF RIGHT, and even when the jurisdiction is doubtful, it will not issue to the court assuming it, where there is ADEQUATE REMEDY BY APPEAL. State ex rel. Reid vs. Judge, 45 A. 943.

In aid of its APPELLATE JURISDICTION, the Court of Appeals may issue a writ of prohibition to an inferior court, which is proceeding to try a case on the Docket of the Court of Appeals. Failing to obtain relief from that court, the supervisory jurisdiction granted this court by the constitution may be invoked, if the facts warrant it. State ex rel. Kirsch vs. Judge, 45 A. 1206.

Prohibition will not lie to correct alleged irregularity in fixing a case for trial, where the jurisdiction of the court *ratione materiae et personae* is unquestioned. State ex rel. Shaw vs. Monroe, Judge, 48 A. 27.

The district courts have jurisdiction under Act 139, 1896, of a proceeding to disbar an attorney for misconduct, and consequently prohibition will not lie. State ex rel. Adams vs. Judge, 49 A. 1015.

Prohibition will not lie where the act to be prohibited has already been committed. So when the Judge of the District Court rendered judgment on appeal from a justice court, and remanded the case for further proceedings, it is too late to obtain the writ to prohibit him from doing what he had already done. State ex rel. McLeod vs. Judge, 50 A. 109.

A REHEARING WILL NOT BE GRANTED where the court refused to grant a writ of prohibition. State ex rel. Rice vs. Judge, 53 A. 933.

Art. 857. When Certiorari Will Issue—

Certiorari will not issue to bring up for examination the record of a case in which an appeal has been taken and perfected and the return day of which has not been reached. The writ can only be resorted to where proceedings are absolutely null, it can not be used as a substitute for a motion to dismiss an appeal anterior to the return day thereof. State ex rel. City vs. Judge, 45 A. 950.

The District Court maintained the exception of no cause of action filed before answer in the case. On appeal to the Court of Appeals the judgment below was reversed and the court decided the case on the merits on the ground that the exception admitted the allegations of the petition for all purposes of the case. Held, that the action of the Court of Appeals amounted to AN ABSOLUTE REFUSAL TO HEAR THE DEFENDANT; writ of *certiorari* was made absolute, and the Court of Appeals

ordered to try the case in accordance with law. *State ex rel. Negrotto vs. Judges*, 45 A. 1437.

Certiorari will not lie TO REVIEW AN ORDER GRANTING AN APPEAL from a decree refusing to allow a change of venue. The writ can not be "employed to inquire into the correctness" of any judgment, but "must be restricted to an examination into the external validity of the proceedings in the lower court." *State ex rel. Dist. Att'y vs. Judge*, 48 A. 787.

Certiorari will not lie where the court below has jurisdiction and the forms of law have been followed. *State ex rel. Express Co. vs. Justice*, 48 A. 1249.

Whether the recorder who imposed a fine was or was not entitled to the office is an issue which can not be considered on application for *certiorari*. *State ex rel. Kiernan vs. Judge*, 48 A. 1375.

Certiorari will not lie to review the decision of the Justice of the Peace, ON THE PLEA OF WANT OF DOMICILE. *State ex rel. Brakenridge Lumber Co. vs. Tully*, 48 A. 1582.

Certiorari is not the remedy to recover A FINE IMPOSED BY A RECORDER, and which has been paid (*State ex rel. Kiernan vs. Judge*, 48 A. 1375), nor to bring up for review THE THREATENED REMOVAL by the constable of PROPERTY SEIZED under execution, though it is alleged that the property seized is largely in excess of the writ which has been enjoined. *State ex rel. Algiers, etc., Co. vs. Judge*, 48 A. 1380.

Certiorari will not lie to review a judgment rendered by a court seized with jurisdiction, or WHERE THERE IS AN APPEAL. *State ex rel. Perrilloux vs. Magistrate*, 49 A. 1211.

The Circuit Court of Appeals being without jurisdiction to decide on THE CONSTITUTIONALITY OF A LICENSE TAX, *certiorari* will lie to restrain any judgment which may be rendered thereon by said court. *State ex rel. Tax Collector vs. Circuit Court of Appeals*, 49 A. 1221.

No exception was taken to the jurisdiction *ratione materiae* of the Circuit Court of Appeals until a rehearing was asked. Held, that under these conditions *certiorari* will not lie to annul and declare void the judgment so rendered. The writ will lie to correct proceedings in progress, but AFTER PROCEEDINGS ARE ENDED writs go to the execution of the judgment. *State ex rel. Richardson vs. Judge*, 50 A. 26.

Certiorari will lie to avoid a judgment rendered against one TEMPORARILY ABSENT from the parish, when it is based on citation and writs of attachment which were NEVER SERVED ON HIM, but nailed to the court house door, and when it is below the appellate jurisdiction of any court. *State ex rel. Ford vs. Justice*, 50 A. 459.

Certiorari will lie to review a judgment of a recorder for the city of New Orleans, when the judgment was rendered without any evidence

of the city ordinance being presented. *State ex rel. Hahn vs. Record etc.*, 50 A. 549.

Certiorari will be granted, even pending an application for a rehearing, to bring up documents not included in the transcript of appeal where THE FAULT IS ATTRIBUTABLE TO THE CLERK OF THE COURT and the attention of counsel was not directed to the omission. *Elder & Davis vs. Ludsley*, 50 A. 1077.

Art. 860. What Court Issues *Certiorari*.—

In a case appealable to the Court of Appeals the Supreme Court will not issue writs of *certiorari*, etc. *Troegel vs. Judge*, 46 A. 421.

Art. 861. Certified Copy Must Be Sent in Answer to *Certiorari*.—

Where in answer to *certiorari*, the certified copy of the record set up DOES NOT SHOW THE FACTS sworn to by the judge *a quo* in his return of the writ, the court will hold matters in abeyance, so that the parties may, in the court *a quo*, and contradictorily with each other, correct the minutes, so that they shall conform to the actual facts. *State ex rel. Guarneri vs. Judge*, 52 A. 984.

Arts. 874 to 920. Proceedings in Supreme Court.—

See annotation to Arts. 565 to 602.

Art. 902. Plea of Prescription in Supreme Court.—

Prescription may be pleaded in the Supreme Court, but only against a pending case—and where defendants FAILED TO ANSWER plaintiff's appeal, to recover items rejected below, their plea of prescription will only affect THESE ITEMS, and not the item awarded plaintiff and not appealed from. *Talle et als. vs. Monasterio et als.*, 48 A. 1232.

When a plea of prescription is FIRST URGED in the Supreme Court, the party to whom it is opposed, may have the case remanded for the trial of the issue. The court is without discretion in the matter if the request to remand is made before submission. *Joubert vs. Sampson*, 49 A. 133.

Art. 906. When Cases will be Remanded.—

When plaintiff's petition and the evidence show a legal cause of action, but the decree prayed for is not warranted by either the petition or the prayer, the cause will be remanded. *Beugnot vs. Tremoulet*, 52 A. 454.

Art. 907. Damages for Frivolous Appeal.—

Damages for frivolous appeal will not be allowed where the ISSUE RAISED IS NOT WELL SETTLED. *Germania, etc., Bank vs. Lemle*, 53

A. 1289. Nor for a devolutive appeal. *Mutual National Bank vs. Moore et al.*, 50 A. 1332.

Art. 908. Costs of Appeal.—

The judgment of plaintiff and of defendant on his reconventional demand were both reduced on appeal of plaintiff answered by defendant. Held, that defendant should pay costs. *Fush vs. Egan, Jr., et al.*, 48 A. 60.

See annotation to Art. 157.

Art. 911. Finality of Judgment—Rehearing.—

Where an application for a rehearing is seasonably made, and not acted on, the judgment of the Court of Appeals will not become final ten days after adjournment under Act 100 of 1896. *State ex rel. Hall vs. Judges*, 50 An. 409.

A judgment of the Court of Appeals does not become final by the disagreement of the two judges of the court on the application for a rehearing—a judge *ad hoc* should have been appointed. *Constitution 1898, Art. 102. State ex rel. Thrower vs. Judges*, 50 A. 644.

A rehearing will not be granted where the court refused to grant a writ of prohibition. *State ex rel. Rice vs. Judge*, 52 A. 983.

Art. 1003. Putting in Possession—Order to Account—

Where the heir has been put in possession, the creditor of the ancestor can not seize the property inherited by the heir, without first obtaining judgment against him. One against the ancestor will not suffice. *Hart vs. Connolly*, 49 A. 1587.

The right of heirs to be put in possession is not dependent upon or deferred until the executor files his account, and when they are put in possession creditors can not require the executor to file an account, but must seek payment from the heirs. *Succession of Duffy*, 50 A. 795.

Art. 1016. Removal of Tutor—

A curator *ad hoc* will not be appointed to represent a properly appointed present under-tutor, in a suit to remove the tutor, when the under-tutor is willing to proceed if the need existed. *Welch, Curator, vs. Baxter*, 45 A. 1062.

Art. 1054. Payment of Ordinary Claims—

Where the account of an administrator has been homologated, it is not necessary for the creditor to give him notice of the judgment of homologation, or to call for a statement of the succession funds, before proceeding against the surety on the administrator's bond. *Hayes et als. vs. Dugas et als.*, 51 A. 447.

Art. 1063. Jurisdiction of Justices of the Peace—

The damages resulting from the refusal of a party to do a certain thing, for a number of consecutive days, furnish but one cause of action, and the demand can not be split up into as many parts as there were days, for the purpose of giving jurisdiction to a justice of the peace. State ex rel. Dobson vs. Justice, 49 A. 52.

A justice of the peace is competent to entertain jurisdiction of an intervention claiming a privilege in property under seizure IN A JUDGMENT obtained in his court, although the intervener's claim is far in excess of the justice's jurisdiction. (State ex rel. McLeod vs. Judge, 50 A. 109.) Where, however, the claim is NOT LIQUIDATED and is in excess of the jurisdiction of the justice, the creditor may sue in the District Court to assert his privilege, and there have the matter adjudicated. Brown, Jr., vs. Washington et als., 51 A. 483.

Art. 1065. May Employ Sheriff.

ACT 92 OF 1896, p. 133.

To amend and re-enact Act No. 110 of the General Assembly of 1888, entitled "An act authorizing justices of the peace throughout the State to employ either the sheriff or his deputy in certain cases," approved July 12, 1888.

Be it enacted by the General Assembly of the State of Louisiana That Act No. 110 of the General Assembly of 1888, entitled "An act authorizing justices of the peace throughout the State to employ either the sheriff or his deputy in certain cases," approved July 12, 1888, be, and the same is hereby amended and re-enacted so as to read as follows, to-wit:

SECTION 1. That in case of the inability to act in the place of the constable, because of relationship, sickness or otherwise, and in case of the execution or conservatory writs in civil suits, the justices of the peace throughout the State are authorized to employ either the sheriff or his deputy to execute all orders, citations, summons, seizures and writs.

SEC. 2. Be it further enacted, etc., That when there is a constable not disqualified to act because of relationship or unable to act on account of sickness, and who is willing to act and is personally present when conservatory writs are sued out, then and in their cases, the justice of the peace for whose ward said constable shall have been elected or appointed and qualified shall employ said constable to the exclusion of the sheriff or his deputy, to execute all orders, citations, summons, seizures and writs in civil cases, and in such a case services made by other than the constable shall be void and of no effect.

SEC. 3. Be it further enacted, etc., That all laws or parts of laws in conflict with this act are hereby repealed, and that this act take effect from its passage.

Art. 1068. Jurisdiction—Immovables—

The city court is without jurisdiction *ratione materiæ* where a suit for rent requires for its determination the issue whether the property on which rent is claimed belongs to the defendant as her separate property or to the heir of the deceased husband. *State ex rel. Toussaint vs. Judge*, 49 A. 1560.

A court of limited jurisdiction—a city court—has jurisdiction to pass indirectly on matters which could not legally be brought before them directly. Hence it may, under such circumstances, pass on the question whether defendants constituted a corporation or a partnership. *Schick vs. Corbett et als.*, 52 A. 180.

Art. 1069. Jurisdiction Continued—

“In civil cases within their competence justices of the peace can only cite before them such persons as are domiciled or residing within the limits of their jurisdiction or strangers who may chance to be there;” and “in all cases where any corporation shall commit trespass or do anything for which an action of damages lies, it shall be liable to be sued in the ward where such damage is done or trespass committed.”

In this case the term strangers applies to such as have no domicile or fixed place of residence in the State.

Provided further, That courts may issue their commission to any magistrate of the parish, wherein a witness shall reside, to examine such witness and receive his deposition.”

SEC. 2. That all laws contrary to or inconsistent with this act be and the same are hereby repealed. (As amended by Act 7, 1888, p. 7.)

This act is constitutional. *State ex rel. R. R. Co. vs. Justice*, 41 A. 1094.

A parish may be sued before a justice of the peace of any of its wards—that the police jury holds its sessions at the parish seat, does not preclude it from being cited in wards other than the one containing the parish seat. *State ex rel. Police Jury vs. Judge*, 46 A. 117.

Where a party to a suit applies to a justice of the peace, for a commission to take testimony, reasonable time should be given him to obtain the desired testimony. *State ex rel. Green vs. Fredent*, 48 A. 1874.

Art. 1082. When Answer is Due—

“The defendant thus cited shall only be obliged to appear and answer to the action the third day after the day of service of the citation, if he resides or happens to be in the city or precincts of New Orleans, or within ten days after such service, in other parts of the State.” (As amended by Act 16, 1894, p. 13.)

Art. 1085. Trial, Judgment, Notice—

"If at the time fixed for the hearing of the cause one of the parties fails to appear, the justice, after the lapse of an hour, if the party reside in town, or after waiting an hour longer if they reside in the country, shall discharge the defendant with costs if it be the plaintiff who makes default, and if it be the defendant the justice shall proceed to hear the plaintiff's testimony, and if he find the claim to be well founded and when the demand is for a sum due on an open account, then an affidavit of the correctness thereof before any competent officer shall be *prima facie* proof, he shall grant a judgment by default against the defendant, which may be carried into execution three days after being notified by him." (As amended by Act 102, 1898, p. 128.)

In proceedings before the city courts no default preliminary to judgment is required. The court can not by its rules exact it. *State ex rel. D'Amico vs. Judge*, 46 A. 365.

A justice of the peace is not required to assign and try separately from the merits an exception which the defendant has filed. *The State ex rel. Brakenridge Lumber Co. vs. Tully*, 48 A. 1532.

Where cases are fixed for trial by consent of parties, the justice need not wait an hour for the defendant. *State ex rel. Reedy vs. Justice*, 68 A. 1162.

Art. 1096. Conservatory Writs.—**Justice of the Peace May Issue Injunction.**

R. S., 2049. Justices of the peace are authorized and empowered to issue writs of injunction enjoining the execution of judgments emanating from their respective courts in the manner and for the reasons authorizing the issuing of writs of injunction in judgments rendered by the district or parish courts of this State, the party requiring the same to furnish the same proof, and give the same bond and security as is required to obtain the same from district or parish courts of this State.

See authorities on page 785.

Art. 1116. Attachment in Justice's Court —

"A person who is creditor for a sum within the cognizance of a justice of the peace may attach the property of his debtor in the five following cases:

First—If his debtor resides out of the State.

Second—If the debtor is about permanently to depart from the State.

Third—If the debtor be only transiently within the State, and have no domicile in it, or so conceals himself that process of law can not be served on him.

Fourth—When he has mortgaged, assigned, or disposed of, or is about to mortgage, assign, or dispose of his property, rights, or credits or some part thereof, with intent to defraud his creditors, or give an unfair preference to some of them.

Fifth—When he has converted, or is about to convert, his property into money or evidences of debt, with intent to place it beyond the reach of his creditors.” (As amended by Act 105 of 1877, E. S., p. 178.)

See annotation to Art. 642—Garnishment.

Art. 1118. Attachment Bond—Conditions—

“The creditor shall moreover deliver to the justice his bond in favor of the defendant for a sum equal to that which he claims, with one good and sufficient surety, to answer such damage as the defendant may sustain in case the attachment should prove to be improperly obtained.” (As amended by Act 27 of 1882, p. 42.) •

Art. 1120. Service of Citation—Modes—

See annotation to Art. 254.

Art. 1124. Sequestration.

“R. S. 2091. For actions of sequestration before the justices, whenever the defendant shall fail or neglect to execute his bond in favor of the constable, with one good and solvent security, for whatever amount the justices may determine, as being equal to the value of the property to be left in his possession, within three days after the notice of the seizure by the constable, it shall then be lawful for the plaintiff, his agent or attorney, to give similar bond or security to the constable as required by law, from the defendant, and to take the property sequestered into his possession.”

See Art. 51, 1876, p. 92, giving intervenors the right to bond property attached, sequestered or provisionally seized. See note of authorities as well as act printed in Wolff's Revised Laws, pp. 25, 26. Does this act apply to writs in Justices' Courts?

Art. 1129. Appeals from Justice Court—

Parties may amend their pleadings or, perhaps, even file pleadings for the first time, in appeals from justice of the peace court. State ex rel. Reedy vs. Justice, 49 A. 1162.

Though trials are *de novo* on appeal from a justice of the peace court to the District Court, there is not a right to trial by jury. State ex rel. Newland vs. Judge, 50 A. 445.

Art. 1131. Suspensive Appeal.—

“No appeal from a judgment before a justice of the peace or judge of city court in the parish of Orleans shall stay execution unless the said appeal be taken three days after final judgment, if it has been pronounced in the presence of the parties, or within three days after notification of it if it has been rendered in the absence or on the default of one of the parties, and unless the appellant shall execute his bond in the appellee's favor with one good and sufficient security for a

sum exceeding by one-half the amount for which the judgment was given, conditioned that he shall pay such sum as shall be awarded against him on appeal. Judgment shall not be final until action by the court upon any motion for a new trial which may have been made within the delay now authorized by law or the rules of court." (As amended by Act 129, 1888, p. 188.)

Art. 1135. Filing Transcript—Right of Appellant.—

Filing transcript before return day will not advance appeal, so as to deprive appellant of the right to issue citation if notice had been issued, or correct defective citation until the regular return day. *State ex rel. Broussard vs. Judge*, 49 A. 1562.

Art. 1142. Seizures—Constables' Charges.—

"In all cases where the constable seizes movable property under process from the magistrate's court he shall either keep actual possession of the property seized or shall appoint a keeper to take care of it, and the possession of such keeper shall be that of the constable appointing him.

The charges for keeping said property under seizure in any case shall not exceed fifty (50) cents per day for the whole seizure." (As amended by Act 19, 1896, p. 17.)

GENERAL INDEX.

Figures following immediately after words indicate the article,
figures at the end of the line the page.

ABATEMENT

	PAGE.
No—of action by death of party, after answer, 21.....	17

ABSENTEES (See CURATORS, PARTITION)

—Cannot sue except through curator, 108.....	65
Curators suing for—sue in their name, 109	66
Unrepresented—may be sued through curator <i>ad hoc</i> , 116..	70
One citation sufficient for several—represented by one curator, 182.....	117
Citation on—in attachment must be posted, 254.....	165
In attachment, advocate named for, 260.....	177
When—may obtain reversal of judgment, 267, 268.....	182, 183
May appeal within two years from date of judgment, 593....	462
When judgment on attachment against—subject to rescission, 614	486
Attorney will be appointed to represent—mortgagor, 737....	572
In partition, judge of locality names curator for, 963.....	738
Curator of—may be removed, 1013.....	760

ABSENT HEIR (See HEIR, VACANT SUCCESSION, SUCCESSIONS)

Curators of—may sue without naming heir, 111.....	67
Service must be made on curator of, 194, 195.....	121
Attorney will be named for—to demand account from admin- istrator, 1009	759

ACCOUNT OF ADMINISTRATORS, ETC.

	PAGE
Only judge appointing officer, may order, 997.....	755
—may be demanded by petition, 998.....	755
Minor may demand—after majority, 999.....	755
Heirs put in possession, may demand, 1003.....	756
Objections to—must be made within three days, 1004.....	757
—may be referred to auditor, 1005.....	757
Who pays costs, when—objected to, 1006.....	758
Who will be charged with interest, 1007.....	758
Judge names attorney for absent heirs—to compel rendition of, 1009, 1010	759
Penalties for refusal to render, 1011, 1012.....	759

ACQUIESCENCE IN JUDGMENT

No appeal where there is, 567.....	426
------------------------------------	-----

ACTIONS (See CUMULATION, DEMAND, DOMICILE, HYPOTHECARY
ACTIONS, JUDGES, JURISDICTION, PARTIES, PREMATURETY, SUITS,
AND GENERALLY SUCH TERMS AS DENOTE PARTIES TO ACTIONS AS
MINORS, HUSBANDS, ETC.)

Definition of, 1.....	1
Classes of, 2, 4.....	1, 4
Personal, 3.....	2
Against whom they lie, 26, 27.....	19
Grounds of, 28 to 32.....	19, 20
Real, 4.....	3
Against whom they lie, 41.....	22
—lie against thing, 42.....	23
Petitory—see that Title.	
Possessory—see that Title.	
Mixed, 7.....	3
Civil, 8, 9	3, 4
Criminal, 8, 10.....	3, 4
Nature of—for incorporeal right, how determined, 12.....	4
Form, effect and prescription of—governed by <i>Lex Fori</i> , 13..	5
When right of—arises, 14.....	6
Interest in—must be real, 15.....	7
When right of—ceases, 16.....	15
No—to enforce natural obligation, 17.....	15

ACTIONS—*Continued.*

	PAGE.
—of repetition, to recover what is paid in error, 18.....	15
No right of—to enforce criminal or immoral obligation, 19..	16
Cause of—may be used as exception, 20.....	17
—do not abate by death of party, after answer, 21.....	17
—are transmissible, 22.....	18
—and pass to heirs, 113.....	68
—pass to universal successors, etc., 23, 24.....	18
—lie against heirs and universal legatees, etc., 25.....	18
Direct—what are, 33, 34.....	20
Equitable—what are, 33, 35.....	20
When direct and contrary—arise, 36, 37, 38.....	21, 22
Synallagmatic contracts gives rise to direct, 39.....	22
—lie against heirs, 40.....	22
—must be brought before competent judges, 75 to 93....	43 to 48
And sum remitted to give jurisdiction, cannot be recovered, 91	47
Will not lie before two courts (<i>lis pendens</i>), 94.....	48
Who may be parties to, 99 to 101.....	51 to 53
Who are not necessary parties to—.....	54 to 56
How—are brought, 96 <i>et seq.</i> , 169 <i>et seq.</i>	49, 109
—are ordinary, summary or executory, 97, 98.....	50
Who may institute, 102 <i>et seq.</i>	51, 57 to 61
Joinder of parties to—.....	55, 56
Improper joinder of parties to—.....	56, 57
—may be instituted by all. No distinction as to race, etc., 103	62
Children under parental control cannot institute, 104.....	62
For minors, interdicts, absentees—must be brought by tutor	
or curator, 108	65
Personal and possessory—of wife, are brought by husband, 107	
.....	64, 65
Minor husband can bring—without curator, 110.....	67
And—may be brought against them, 114.....	69
—by corporations must be in name of corporation, 112.....	67
—are divisible, and pass to heirs, 113.....	68
—by curators, tutors, etc., brought in name of wards, 109....	66
but curators of vacant successions or absent heirs, sue in	
their own name, 111.....	67
—against minor, must be brought against tutor—.....	69, 70
—against interdict, must be brought against curator.....	69, 70
—against curator, etc., continued in their name, though gestion	
has ceased	76, 77

ACTIONS—*Continued.*

	PAGE.
All kinds of—may be brought against vacant successions, 122.	78
Executor may defend, 123.	79
—lie against heirs and executors.	79, 80
—must be brought at defendant's domicile, 162.	100, 102
But of revendication, etc., at defendant's domicile or situs of property, 163	103
Relative to successions, where it was opened, 164.	104
For other exceptions to rule of domicile, 165.	105
Where debtor changes domicile—may be brought at either place, 167	108
—are void unless defendant is cited, 206.	125
Consolidation of—when allowed, 422.	324
—may be renewed after discontinuance, 492.	358
—to annul judgment where brought.	481, 482

ACTS—

Notaries need not produce original—on subpoena, 142.	92
Certified copies of notarial and official—to be annexed to petition, 174	110
—under private signature, to be produced on prayer for oyer, 175	111

ADMINISTRATOR (See Succession)—

Suits against—continue in his name, etc., 120.	76
When—appointed for succession, 976.	742 to 744
Beneficiary heir has preference for appointment as—976.	742
—must give security, 976.	743
Claims against succession must be presented to—984.	747
How claims are liquidated, 985.	747
But if not liquidated, suit may be filed, 986.	748
How—pays claims, 987.	749
—must file tableau and determine rank of creditors, 988.	750
Execution against—for failure to account, 993 to 995.	753, 754
To what court—shall account, 997.	755
When—shall pay claimants and heirs, 1007.	758
—when requested, must render account to absent heirs, 1009.	759
When—must pay balance to State Treasury, 1009.	759

ADMINISTRATOR—*Continued.*

	PAGE.
—failing to pay over, may be imprisoned, 1012.....	759
—may be removed from office, 1013.....	760
Removal of—how obtained, and by whom, 1015 to 1018...	761, 762
Counsel for absent heirs may obtain removal of—1019.....	762
When—must pay privileged claims, 1053, 1055.....	772
When—must pay ordinary claims, 1054, 1055.....	773
Judgment creditor may force—to account, 1056.....	773
When execution will issue against—1057.....	773
And property may be distrained, 1058.....	774
Suspensive appeal will not lie from appointment of, 1059....	774

ADVERTISEMENT OF JUDICIAL SALES (See Sales)—

ADVOCATES (See Absentees, Absent Heirs, Attorneys for Absent Heirs.)

—must conduct themselves properly in argument, 486..... 354

AFFIDAVIT (See Attachment, Injunction, Provisional Seizure, Sequestration, Oath)—

—for arrest, 214.....	131
May be made by creditor, agent, etc., 215.....	132
Before whom it may be made, and terms thereof, 216.....	133
Agent, etc., may make—for all conservatory writs, 217.....	133
—for attachment, 243	150
—for sequestration, 276.....	189
—for provisional seizure, 287.....	202
—for proceeding <i>in rem</i> , 291.....	209
—for injunction, 304	226
—for continuance of cause, 465, 466.....	344, 345
—for new trial, 561.....	405
When—not necessary for new trial, 562.....	406
—of principal or agent to obtain conservatory writs in justice courts, 1125, 1126	793

AFFINITY. Relationship by,

—is not cause for recusation of judge, 339..... 268

AGENT—

	PAGE
When service of citation may be made on—196.....	121
In absence of principal—may make affidavit for arrest, 215....	122
Before whom it may be made, 216.....	123
In absence of principal—may make affidavits for all conserva- tory writs, 217	123

ALIAS WRIT OF FIERIE FACIAS—

—may issue, where first returned <i>nulla bona</i> , 727, 728.....	300
--	-----

AMENDMENT—(See Petition, Answer)

—of petition on exception of inconsistency, 152.....	87
—lies to augment demand, 156.....	96
—lies to claim interest, 157.....	96
—of petition, after issue joined, 419.....	314
When allowed and when not allowed.....	319 to 322
Amended petition for injunction requires affidavit.....	323
—of answer, when allowed, 420.....	323
Leave of court required for—of petition or answer.....	322
When answer to amended petition must be made, 421.....	323
—of judgment, 547	324

AMICABLE COMPOUNDERS—(See Auditors, Experts)

Award of—binding on court, 460.....	341
Opposition to award of—how tried, 461.....	341
Compensation of—taxed as costs, 462.....	341

AMICABLE DEMAND—(See Demand, Tender)

—in writing not prerequisite to suit, 169.....	109
--	-----

ANSWER—(See Amendment, Garnishee, Garnishment)

Delay allowed for filing—180.....	115
Delay allowed sheriff to file—to rule on bond of release for ar- rest, 227, 228	137
—of garnishee, how and when made, 262 to 264.....	178
Requirement of—and when taken as confessed.....	159 to 162

ANSWER—Continued.

	PAGE.
How delay for filing—obtained, 316.....	245
Where—may be filed on first day of term, 317.....	246
Computation of delay for filing—318.....	246
Contents and prayer of—319.....	246
Refusal to file—prayer foroyer, etc., 320, 321.....	247
Exception to jurisdiction must be filed before—322.....	248
—of general denial, admits signature, etc., 323.....	248
Effect of denial or acknowledgment of signature, 324, 325..	250, 251
Proof of signature denied in—cuts off other defense, 326.....	252
Special defenses in—327	253
Incidental demands may be urged in—328.....	255
No replication to—permitted or necessary, 329.....	256
—of warrantor, delay allowed, 381.....	295
—of appellee and appearance, 591.....	461
—before justice of the peace made verbally, 1073.....	779
And must be recorded by him, 1074.....	781

APPEAL—(See Supreme Court)

1. IN GENERAL.

What is—564	406
When—excludes other remedies	407
Issues on—	408
Authority of court <i>a qua</i> after—	408 to 410
No change in judgment between appellees.....	410
Necessary parties to—	410 to 414
Mutuality of—	414
No—after prescribed term, 567.....	427
To which court—lies, 568 to 570.....	429, 430
—may be taken by motion or petition, 573.....	432
But if by motion, must be taken at same term, 573.....	432
Order, bond and return day of—, 574.....	434
What judge may grant order of—	436, 437
Judge fixes bond, when law does not prescribe amount.....	437
—and return day—extension of	437
Proceedings against surety on bond of—, 596.....	466
Abandonment of—certificate of appellate court, 599.....	460
Or appellee may have judgment, 590.....	460
Appearance of appellee and answer, 591.....	461

APPEAL—Continued.

	PAGE
Amendment of judgment at instance of appellee, 592.....	461
Term for prescription of—Exception, 593.....	462
No dismissal of—for errors of officers, 898.....	711
Withdrawal and renewal of—, 594.....	464
When not had without consent of parties, 901.....	709
When trial on—is <i>de novo</i> , 586.....	458
Original pleas on—, 902.....	709
Case may be remanded to try them, 902.....	709
Making parties to, 903.....	712
Damages for frivolous appeal, 906.....	715
Costs of—, 908.....	717
Reason for judgment, 909.....	717
Entry of judgment in—, 910.....	717
For—from justice of peace, see Art. 1128, <i>et seq.</i>	794, 795
2. FROM WHAT JUDGMENTS—LIES.	
—lies from all final judgments, 565.....	414
And from interlocutory—when injury irreparable, 566.....	417
What are appealable interlocutory judgments.....	417 to 421
What are not appealable interlocutory judgments.....	421 to 425
Tests of irreparable nature of injury.....	425, 426
—lies from certain orders not judgments.....	426
—does not lie from—confessed or acquiesced in, 567.....	426
What is or is not acquiescence, etc.....	427, 428
3. WHO MAY APPEAL.	
Parties to cause, and third parties aggrieved by judgment, 571.....	431
Third party who may—and when.....	430, 431
Third persons who may not—.....	431, 432
Tutors, curators and other representatives may—, 572.....	432
When creditor cannot—, 904.....	712
4. SUSPENSIVE APPEAL.	
Requisites for suspensive—, 575.....	435
Time within which it must be taken, etc.....	439
Requisites of bond for suspensive—.....	440
When bond for costs for suspensive—sufficient.....	441
Bond for—when delivery of perishable property is ordered, 576.....	450
Where order is for delivery of immovable property, 577....	450

APPEAL—*Continued.*

	PAGE.
Conditions of appeal bond, 579.....	451
Proceedings against surety on bond, 596.....	266
When suspensive—does not lie, 580, 1059.....	451, 774

5. DEVOLUTIVE APPEAL.

When—may be taken, effect and bond, 578.....	451
Bond for costs alone required in, 578.....	451

6. TRANSCRIPT OF APPEAL—RETURN DAY.

Judge fixes return day of appeal, 574.....	434
Transcript of—how prepared, 585.....	457
Appellant must file—on return day, 587.....	458
Proceeding for failure to file—, 588, 883.....	459, 689
Appellee may have certificate of abandonment of—, 589, 883	460, 689
Or may order up transcript and have judgment on—, 590, 884	460, 690
Appellant may obtain extension of time, 883.....	689
And at expiration of time, rights of appellee revive, 885....	692
See No. 8.	

7. STATEMENT OF FACTS.

When testimony not written down—necessary, 602.....	470
Court makes—when parties disagree, 603.....	471
<i>Mandamus</i> to judge to make—, 900.....	709
See No. 8.	

8. RECORD OF CASE AND CERTIFICATE OF CLERK.

Supreme Court takes cognizance only of facts in—, 895, 896	697, 698
Appeal may be rejected where—incomplete, 896.....	698
Office of assignment of errors, 897.....	700
Where—incomplete, <i>certiorari</i> may issue, 898.....	701
and <i>mandamus</i> may issue to judge or clerk to complete—, 899	709
No dismissal of appeal for defects in—due to officers, 898....	701
Where—incomplete, case may be remanded, 906.....	713

APPEAL—*Continued.*

PAGE

9. CITATION OF APPEAL.

Citation of—must be served on appellee, 581 (see pp. 433, 434)	453
Service of citation of, 582.	454
Requisites of citation of—, 583.	455
Return of service on citation of—, 584.	457
Making parties to appeal, 903.	712

10. ANSWER OF APPEAL.

Appearance of appellee and—, 591.	461
Amendment of judgment at instance of appellee, 592.	461
When appellee must file—, 886, 890.	692, 695
What may be asked in—, 887.	694
Appellee may pray for amendment of judgment in—, 888.	694
Effect of failure to answer—, 889.	695
Answer not essential, 891.	696

11. HEARING OF APPEAL.

—proceeds in absence of one of the parties, 892.	696
New—to absentee, when absence unavoidable, 893.	696
—is on evidence in record, 894, 895.	697
Original pleas on—, 902.	709
See REHEARING.	

APPEARANCE AND ANSWER—

See ANSWER, APPEAL, No. 10.

APPRAISEMENT—(See SALE, EXECUTORY PROCESS.)

—how made in provisional seizures, 287.	202
In seizure under <i>fi. fa.</i> —to reduce, 652.	523
—how made in seizure under <i>fi. fa.</i> , 653.	523
Appointment of appraisers, how made, 671.	533
No fee allowed appraisers, 671.	534
Sheriff appoints appraisers where parties refuse, 672.	535
Oath of appraisers, umpire and report, 673 to 675.	536
—must minutely describe property, 676.	536
Sale must realize two-thirds of—, 680.	539
—of immovables under executory process, 745.	577

APPRAISEMENT—*Continued.*

	PAGE.
—to test jurisdiction of justices in action of revendication, 1089	782

APPRAISERS—

See APPRAISEMENT, SALE.

APPELLATE JURISDICTION—

See JURISDICTION, APPEAL, SUPREME COURT.

ARBITRATORS—

See JUDICIAL ARBITRATORS.

ARGUMENT—

No evidence received after—except by consent, 484.	353
Order of—at trial, 485.	354
Advocates must conduct themselves properly during—, 486. .	354
Supreme Court will hear—though one party absent, 892.	696

ARREST OF DEBTOR (See HABEAS CORPUS)

Court has power to order—	92
—cannot be made after sunset.	127
—is means to secure person of debtor, 210.	129
Persons not subject to, 211.	129
Causes for—and mode of obtaining writ, 212.	129
Affidavit and bond for—, 214.	131
Affidavit for—by whom made, 215.	132
Before whom made, 216.	132
How debtor may be released from—, 218.	133
On bond or by cession, 219.	134
By deposit of property, 220.	135
—may be had for obligation not due, 221.	135
How released in such case, 222.	135
—after cession of goods, 223.	136
How discharged from arrest in such case, 224.	136
Bonds of release, returned by sheriff to clerk, 225.	136
Exceptions to such bond, how urged, 226.	137

ARREST OF DEBTOR—*Continued.*

	PAGE
When sheriff may be held personally for release, 227 to 229.....	137
Surety on such bond, may be released by surrender of debtor, 230	137
When and how surety may be discharged, 231 to 234.....	138, 139
When judgment may be had against surety, 235.....	139
Extent of such judgment, 236.....	139
—may be had before or after filing suit, 237.....	139
Before filing petition, which may be filed next day, 237.....	140
—cannot be had, except for causes mentioned, 238.....	140
—of garnishee, 247, 248.....	163
How garnishee may be released from—, 249.....	164
—may be had in another parish	594
—cannot be had, when going to or returning from militia muster	595
—before justice of the peace, 1097 <i>et seq.</i>	785, 789

ASSIGNMENT OF ERRORS

Office of—in appeals, 897.....	700
--------------------------------	-----

ATTACHMENT (See GARNISHEE, GARNISHMENT.)

1. IN GENERAL.

Affidavit for—may be made by agent, 217.....	137
Causes for—, 240.....	147
Property subject to—, 241.....	147
Nature of debt for which—will lie, 242.....	149
Petition and affidavit for—, 243.....	150
When debt not due, 244.....	152
Bond necessary to obtain, 245.....	152
Service of citation on defendant in—, 253, 254.....	163
Sheriff keeps petition, where defendant in—absent, 255.....	164
Seizure by sheriff in—cases, 256.....	167
Possession by sheriff and inventory, 257.....	167
Advocate to represent absent defendant in—, 260.....	177
Sale of perishable property in— <i>pendente lite</i> , 261.....	177
Judgment and execution in—, 265.....	178
Privilege resulting from—	179
Judgment must recognize privilege.....	179
Conflict between privileges and parties	197

ATTACHMENT—*Continued.*

	PAGE.
Cancelling plaintiffs bond in—, 266.....	182
Privilege conferred by—, 724.....	560
—before justices of peace, 1116 <i>et seq.</i> , 1127.....	789, 790

2. DISSOLUTION OF ATTACHMENT.

—how obtained, 258.....	169
Motion for—to be served on plaintiff.....	169
Summary trial of motion for—, ...	169
Motion for—is not appearance on merits.....	169
Grounds of—	171
Motion for—must be made before pleading to merits.....	172
Effect of—	172 to 174
Damages on—	172
Bonding does not affect motion	173

3. BONDING ATTACHMENT.

Defendant may bond—, 259.....	173
Sheriff returns bond into court, 259.....	173
Proceedings against surety, where defendant defaults, 259..	173
Intervenor may bond	173
Terms and conditions of bond	175
Effect of—	175
<i>Mandamus</i> lies to allow—	176

ATTORNEY AT LAW

—may be punished for contempt, 132.....	88
—may waive service of petition, 177.....	113
Where principal absent—may make oath, 216.....	133, 139
When—will be appointed to represent absentee defendant in attachment, 260	177
When in proceedings <i>in rem</i> , 294.....	210
When in hypothecary actions, 737.....	572
When as counsel for absent heirs, 1009, 1010.....	759
When to compel administrators, etc., to account, 1009.....	759
Rule why depositions shall not be received may be served on— 439	331, 332
—must conduct themselves properly in argument, 486.....	354
and are responsible for slanderous words, 486.....	354
—may make oath for conservatory writs before justices, 1126..	793

ATTORNEY FOR ABSENT HEIRS, (See ATTORNEY, ATTORNEY IN FACT.)

When court will name—, 1009.....	111
Duties of—, 1010.....	111

ATTORNEY IN FACT

One citation sufficient where—represents several defendants, 182	111
—may make affidavit and give bond for arrest of debtor, 214.....	111
—may make oath for conservatory writs....	133, 139, 140, 153, 154

AUDITORS

—may be named to examine intricate accounts, 443.....	111
—how named, when umpire will be appointed, 446, 447.....	111
Oath, report, etc. of—, 448.....	111
Refusal of—to serve, 449.....	111
—not allowed to resign after oath, 450.....	111
Witnesses may be summoned before—, 451.....	111
Liability of—for damages for refusal to act, 452.....	111
—must make report, 453, 454.....	111
Report of—must be clear, etc., 455.....	111
Rule to homologate report of—, 456.....	111
Opposition to homologation of report of, 457.....	111
Report of—not conclusive on court, 458.....	111
Trial of opposition to report of—, 461, 755.....	341, 111
Compensation of—, 462.....	111

AUTHORIZATION OF WIFE

See WIFE.

AWARD

See AUDITORS, EXPERTS, JUDICIAL ARBITRATORS.

BAIL

See ARREST OF DEBTOR.

BANKS

Service of citation on—how made, 198.....	111
---	-----

BED AND BOARD

	PAGE.
Jurisdiction of parish courts in suits for.....	85
Appeal in suits for separation from, 573.....	842

BENEFIT OF INVENTORY

See INVENTORY, BENEFIT OF

BILLS OF EXCEPTION

—may be taken to parol testimony, 481.....	351
and to documents offered in evidence, 483.....	353
and to opinion of court, 487.....	354
Note in lieu of—	355
What—must contain, 488.....	355
Requisites of—	356
—must be presented to opposing counsel, 489.....	356

BONDS

Surety on official—where sued, 165.....	106
—for arrest of debtor, 214.....	131
—for release from arrest, 219.....	134
—for attachment	154 to 157
When cancelled	182
—for release of attachment.....	173
—for sequestration, 276 to 278.....	189 to 191
—for release of sequestration, 279.....	191
Lessee may—provisional seizure, 287.....	202
Intervenor may—seizure of ships, etc., 289.....	207
Intervenor may bond all writs.....	173, 194, 207
Plaintiff may bond provisional seizure.....	207
—for injunction, 304.....	226
—for dissolution of injunction, 307.....	233
—of appeal, 574.....	434
—for suspensive appeal, 575.....	438
Where order is for delivery of real or personal property, 576, 577	450
—for devolutive appeal, 578.....	451
Terms and conditions of appeal—, 579.....	451
Proceedings against surety on appeal—, 596.....	466
are summary, 754.....	585

BONDS—*Continued.*

	PAGE
—for injunction of executory process, 750.....	521
—for conservatory process in justice's courts, 1127.....	700

BOOKS AND PAPERS

See SUBPOENA DUCES TECUM.

CAPIAS AD SATISFACIENDUM

—may issue against judgment debtor, refusing to make ces- sion, 729	521
Such debtor may be arrested in another parish, 731.....	52
When—may issue against sheriff or other officer, 730.....	52
—issues for disobedience to <i>mandamus</i> , 843.....	60
—issue against notary or other person, refusing to produce will when ordered, 937	79
—may issue against judgment debtor in justice court, 1150.....	52
How such debtor may be released, 1151.....	52

CAPTAIN OR MASTER OF VESSEL

—how cited, 199	15
-----------------------	----

CERTIFICATE (See APPEAL, SALES.)

—of abandonment of appeal, how obtained, 539.....	56
Mortgage and conveyance—to be read at execution sales, 678.....	54

CERTIORARI

Courts may issue writ of—, 788 to 790.....	73
Definition of writ of—, 828.....	63
Object of writ of—and to whom directed, 855.....	63
Writ of—suspends proceedings, 856.....	63
When writ of—will issue, 857.....	63
Recitals of petition for writ of—, 858.....	62
Affidavit of petitioner, 859.....	61
What court issues writ of—, 860.....	63
Response to writ of—, 861.....	63
Failure to comply with order, 862.....	61
Proceedings after issue of writ, are void, 863.....	61
Judgment on and effect of—, 864 to 866.....	61

CESSION OR FORCED SURRENDER

	PAGE.
—may be compelled by judgment creditor, 729.....	561
Debtor may be arrested for failure to make, 729, 731....	561, 562

CHALLENGE

See JUDGE, JUROR, RECUSATION.

CHARGE OF JUDGE

—to jury must be in writing when requested, 515.....	371
—to jury must be confined to the law applicable, 516.....	371
—to jury may be excepted to, 517.....	372

CHILDREN

—subject to control of parents, cannot sue them, 104.....	62
Parish court has jurisdiction of adoption of—, 127.....	84

CITATION (See SERVICE)

No charge for—when service waived, 177.....	113
Clerk must annex—to copy of petition, 178.....	113
Essentials of—, 179.....	114
Delay allowed to be expressed, and delay, how counted, 180..	115
—must be served on each defendant, 181.....	116
When one—will suffice for several defendants, 182.....	117
—on defendants in other parishes, 183, 184.....	117
Sheriff's service of—and return, 185, 186.....	118
Personal service of—how made, 187, 188, 190.....	118, 120
Domiciliary service of—how made, 189, 190.....	118, 120
Service of—on defendant who is <i>sui juris</i> , 190.....	120
who is not <i>sui juris</i> , 191.....	120
on married woman, 192.....	120
on woman divorced or separated, 193....	120
on tutor or curator, 194.....	121
on special tutor, 195.....	121
on agent, 196.....	121
on emancipated minor, 197.....	121
on corporation, public or private, 198.....	122
on banks, commercial firms, captain or crew of ship, 199....	123
Return of sheriff on—, 200 to 205.....	120 to 125

CITATION—*Continued.*

—essential, except in proceedings <i>in rem</i> , 206.....	15
No—on legal holidays or <i>dies non</i> , 207.....	17
—of garnishee, 251, 252.....	164, 165
—of defendant (garnishee?), 253.....	16
—in attachment must be posted, when defendant absent, 254.....	15
—to warrantor, 383.....	26
—of third opposition, how served, 398.....	30
—of appeal, how served, 581, 582, 583.....	453 to 455
Want of—is cause for nullity of judgment, 612.....	43
—in probate court, 1133.....	76
—by justice of peace, 1078 to 1080.....	70

CITATION OF APPEAL (See APPEAL No. 9)

—must be made on appellee, 581.....	43
Mode of service of—, 582.....	44
Requisites of—, 583.....	45
Return of service on—, 584.....	45
No withdrawal of appeal after—, 594.....	46

CIVIL ACTION

See ACTION.

CLERK OF COURT

—responsible for collection of fines, 132.....	3
—may be fined for neglect of duty, 133.....	3
—to receipt for documents filed in answer to <i>subpoena</i> , 143.....	2
—must file and endorse petitions, 176.....	12
—cannot charge for copy of petition, where service accepted, 177.....	12
—must make copy of petition and citation for defendant, 173.....	113, 115
181.....	113, 115
—sends petition, etc., to sheriff of defendant's domicile, 183.....	113, 115
184.....	113, 115
—must make copy of petition, etc., for garnishee, 251, 252.....	164, 165
Duties of—generally, 774.....	42
Shall keep record books, 775.....	42
one for record of cases, 776.....	42
one for minutes, 777.....	42

CLERK OF COURT—*Continued.*

PAGE.

All books must have index and be open to public, 778.....	609
—shall keep all records safely, 779.....	609
—must make copies of documents, etc.; penalty for failure, 780	609
—not entitled to fee, where process defective, 781.....	610
—may appoint deputy, 782.....	610
—must discharge duties imposed by law, 783.....	610
—issues all mandates ordered by judge, 872.....	659

CLERK OF SUPREME COURT

—to enter cases in prescribed order, 879.....	686
—records all judgments rendered by court, 910.....	717
—receipts for documents filed in court, etc., 919.....	721

CITY COURTS

See JUSTICE OF THE PEACE.

COMMERCIAL FIRMS

Where—may be sued, 185.....	105
One petition and citation for—, 182.....	117
Service of citation on—, 198.....	122

COMMISSION TO TAKE TESTIMONY

Court may issue, 138	90
Party interrogated in—must answer, 352.....	278
When—will issue, 424.....	324
To take testimony of witness in another parish, 425.....	325
How—obtained, 426.....	326
Service of—on opponent, 427.....	326
When notice for—not necessary, 428.....	326
Notice for—when opponent absent or not represented, 429..	327
—to take deposition of old, infirm, etc., witnesses, 430.....	327
Witness may be compelled to answer interrogatories under, 431	328
How depositions under—are taken, 432.....	328
How—are executed, 433.....	328
Opponent must have notice of testimony taken under, 434..	330
When notice not necessary, 435.....	330

COMMISSION TO TAKE TESTIMONY—*Continued.*

—to take deposition of witnesses out of State, 436.....	122
To whom—directed, 437.....	122
Interrogatories accompany, 438.....	122
Return day of—etc., 429.....	122
—to take testimony of apprehended suit, 440.....	122
—to take testimony before justice of the peace, 1155.....	122

COMPENSATION OR SET OFF

—is incidental demand, 363.....	122
Demand of—must be in writing, 365.....	122
Definition of term, 366.....	122
When—may be pleaded, 367.....	122
In answer, or by separate suit, 368.....	122
Costs where—is pleaded, 369 to 376.....	122
Effect of plea of—in separate suit, 372.....	122
Where pleaded after judgment, 373.....	122
Plea of—before justice of the peace, 1091 <i>et seq.</i>	122

COMPETENCY (See JURISDICTION, JUDGE, LIS PENDENS)

What is—of judge, 86.....	122
Tests of—, 87.....	122
Object or amount in dispute, 88.....	122
Domicile of defendant, 89.....	122
Territorial confines of judicial authority, 90.....	122
Amount claimed fixes jurisdiction, 91.....	122
Consent cannot vest jurisdiction <i>ratione materiae</i> , 92.....	122
Jurisdiction <i>ratione materiae</i> may be waived, 93.....	122

CONCURSO

Injunction lies to force, 301.....	122
------------------------------------	-----

CONFESSION

See EXECUTORY PROCESS, JUDGMENT, APPEAL, SUBPOENA DUCI TECUM.	
--	--

CONSENT

See COMPETENCY, JUDGE, JURISDICTION, POSSESSORY AND PETITION ACTION.	
---	--

CONSERVATORY WRITS

PAGE.

See ARREST, ATTACHMENT, GARNISHMENT, PROVISIONAL SEIZURE,
SEQUESTRATION, INJUNCTION.

CONSOLIDATION OF ACTIONS

When—permitted, 422.....	324
When—ordered, 423	324

CONSTABLE (See JUSTICES OF THE PEACE)

—may be fined for neglect of duty, 133.....	88
When—may recover counsel fees from warrantor, 385.....	296
—is officer of court, 758.....	592
—may act for sheriff, 265.....	596
How—makes service, 1077 to 1079.....	780
Return by—of service, 1080.....	780
—as witnesses to return of service, 1081.....	781
Arrest of debtor by, 1102.....	786
When—may take appearance bond, 1105.....	787
Service of writ of attachment, etc., by, 1119 to 1121.....	790, 791
of garnishment, 1122.....	791
of citation of appeal, 1134.....	796
Exemptions from seizure by, 1140.....	799
—must safely keep seized property, 1141.....	799
Sales by, 1143.....	800
Time for return on <i>fiere facias</i> , 1147.....	801
—must execute writs from other parishes, 1148.....	802
And see generally, 1156 to 1161.....	804 to 806

CONTEMPT OF COURT

Judges have power to punish, 131.....	87
—by attorneys, how punished, 132.....	88
Attachment and fine of witnesses, 134 to 136.....	89, 90
—for violating injunction, how punished, 308.....	237
Witnesses before auditors may be punished for, 451.....	338
Clerks of court are in—for refusing to make copies, etc., 780..	610
Disobedience of prohibition, punished as, 852.....	651
Justice of the peace, may punish, 1154.....	803

CONTESTATIO LITIS

PAGE

See ISSUE JOINED.

CONTINUANCE

—of trial when granted, 464.....	345
—of trial for absent witnesses, 465.....	344
—granted when counsel attending Legislature as member, 466	345
Affidavit for—of trial, 466.....	345
—of trial because witness sick, exception, 467.....	345
Court has discretion to grant, 468.....	345
Failure to summon witnesses, no ground for, 470.....	346
—may be granted, when witness summoned, but absent, 471..	347

CONTRACTS (See OBLIGATIONS)

Form, effect and prescription of—governed by <i>lex fori</i> , 13....	5
but obligations of—by <i>lex loci contractu</i> , 13.....	5
Obligation of—arise at moment of making, 14.....	6
but action to enforce is at maturity, 14.....	6
—are grounds of personal action, 29.....	20
Synallagmatic—ground for direct personal action, 39.....	22

CONTRARY PERSONAL ACTION

—distinguished from direct action, 36.....	21
When right to—arises, 38.....	22

CORONERS

—may be fined for neglect of duty, 133.....	95
When—acts for sheriff, 771 to 773.....	60

CORPORATIONS

—act judicially through their representatives, 112.....	67
—must be sued under their legal title, 119.....	78
Jurisdiction of—in matters of trespass, 165 and 9.....	106, 107
One petition and citation for, 182.....	117
Service of citation on—how made, 198.....	122
When summary proceeding lies against, 754.....	584
<i>Mandamus</i> to, 835.....	634
Service of <i>mandamus</i> on—Destringas to enforce, 844.....	645

COSTS

	PAGE.
Failure to demand—does not waive them, 157.....	98
—in plea of compensation, 369 to 376.....	287
—due by unsuccessful intervenor, 394.....	304
Successful third opponent entitled to, 402.....	312
—incurred, must be included in tender, 407.....	314
After valid tender—are due by plaintiff, 415.....	318
Failure to act, etc., exposes experts, etc., to payment of, 452..	338
Compensation of experts, etc., taxed as, 462.....	341
Fees of six witnesses, will be taxed as, 472.....	347
Suit may be discontinued on payment of, 491.....	357
—must be paid before renewal of suit, 492.....	358
—follow judgment based on verdict of jury, 523.....	375
Party cast always pays, 549.....	395
so also in incidental demands, 550.....	397
Even if—are not decreed, 551.....	397
What—are taxed, 552	398
Where order for executory process revoked, plaintiff pays, 742	576
Refusal to obey writ of <i>habeas corpus</i> , exposes to, 815.....	613
When judgment affirmed, appellant pays, 907.....	715
If reversed appellee pays, 908.....	717
Unsuccessful opponent to appointment of curator, etc., pays,	
972	741
When beneficiary heir renouncing pays, 978.....	744
—in suits before justices of the peace, 1091 <i>et seq.</i>	784, 785

COUNSEL FOR ABSENT HEIRS

See ABSENT HEIRS, ATTORNEY FOR ABSENT HEIRS, ATTORNEY AT
LAW, ATTORNEY IN FACT.

COURTS

See APPEAL, CONTEMPT OF COURT, JUDGES, JUDGMENT, JURISDICTION, PROBATE COURTS, SUPREME COURT, JUSTICES OF THE PEACE.	
—may subpoena witnesses, 134.....	89
and attach and fine them, 135, 136.....	89, 90
—may issue commissions to take testimony, 138.....	90
—may issue subpoena <i>duces tecum</i> , 139.....	90
—may order production of books, etc., 140.....	91
Have power to issue conservatory writs, 144.....	92

COURTS—*Continued.*

	PAGE
—may make rules, 145.....	93
Summary orders which—may issue, 786.....	611
<i>Habeas corpus</i> , 787	611
<i>Mandamus and prohibition</i> , 788 to 790.....	612
<i>Certiorari</i> , 789, 790.....	612
Implied powers of, 877.....	653

CRIER

—is officer of court, 758.....	592
—holds office for one year, 784.....	611

CRIMINAL ACTION

What is a, 10.....	4
--------------------	---

CRIMINAL JURISDICTION

—extends to crimes, etc., 40.....	44
-----------------------------------	----

CUMULATION

—of petitory and possessory action allowed, exception, 55....	31
But—works renunciation of possessory action, 59, 150.....	32, 94
When—not permitted, 149.....	95
When—permitted, 151	94
Exception lies to—of inconsistent demands, 152.....	97

CURATORS

See ABSENTEES, ACCOUNT, MINORS, INTERDICTS, EXECUTORY PROCESS

—of vacant successions or of absent heirs may sue in his own name, 111	57
—may be sued as representative of interdict, 115.....	59
— <i>ad hoc</i> for minor or absentee, 116.....	70
Suits against—continue after gestion, etc., 120.....	76
—represent vacant successions, 122.....	75
Who appoints—for interdicts, 962.....	738
for absentees, 963	738
— <i>ad hoc</i> when named, 964.....	739

CURATORS—*Continued.*

	PAGE.
When execution will issue against, 994, 995.....	754
Removal of, 1013.....	760
Who may obtain removal of, 1055 to 1019.....	761, 762

DAMAGES

Witness subject to—for refusing to answer questions, 137....	90
Sheriff responsible in—for failure to serve citation and make return, 205	125
Debtor for—may be arrested, 213.....	130
—on dissolution of attachment, 268.....	183
of injunction, 304	226
Amount of—when money judgment enjoined.....	229
—which party aggrieved by violation of injunction may recover, 308	237
When jury must assess—on confirmation of default, 313....	242
Third opponent enjoining must make bond for, 399.....	310
When experts, auditors and arbitrators liable in, 452.....	338
Sheriff liable in—for failure to pay over, 767.....	95, 99
Judge liable in—for failure to obey prohibition, 852.....	651
—for frivolous appeal, must be prayed for in answer to appeal, 887.....	694
—allowed for frivolous appeal, 907.....	715
Notary or other person liable in—for failure to produce will, 937	729

DAYS

For the number of days allowed in various proceedings, see under their respective titles

ACCOUNT, ADMINISTRATOR, APPEAL, ARREST, ATTACHMENT, AUDITORS;

CITATION, COMMISSION TO TAKE TESTIMONY, CONSTABLE, CURATOR;

DEFAULT, DEMAND;

EXECUTORY PROCESS, EXPERTS;

FIERIE FACIAS;

GARNISHMENT;

HYPOTHECARY ACTION;

JUDGMENT, JUSTICE OF THE PEACE;

LEGAL HOLIDAYS;

DAYS—*Continued.*

PAGE

NEW TRIAL;
 POSSESSION, PROVISIONAL SEIZURE;
 REHEARING;
 SALES, SEQUESTRATION, SUPREME COURT;
 TUTOR.

DEATH (See HEIRS, PARTIES).

—does not abate action after answer filed, 21..... 1
 not after issue joined, 361..... 28
 On—of defendant pending appeal, heirs may be made parties
 903 78

DECLINATORY EXCEPTIONS

Object of, 334 25
 —to jurisdiction, 335 28
 —of *lis pendens*, 335 31
 When—may be filed, 336 28
 Filing of—is not joinder of issue, 358..... 2

DEFAULT

Judgment by, 310 25
 how obtained, 311..... 28
 confirmation of, 312 28
 Jury to assess damage in judgment by, 313..... 28
 Setting aside judgment by, 314..... 28
 Dilatory exception cannot be pleaded after, 333..... 28
 —is tacit joinder of issue, 360..... 28
 Definition of judgment by, 334 2

DEFENDANT

See DOMICILE, CITATION, JURISDICTION, PARTIES.

—cannot waive jurisdiction *ratione materiae*, 92..... 4
 but may waive it *ratione personae*, 93..... 4
 not however before suit filed..... 100, 101, 102
 —is party against whom suit is brought, 99, 100..... 50, 51
 —must be sued at domicile, 162..... 10

DEFENDANT—*Continued.*

	PAGE.
In real actions—may be sued at domicile, or situs of property,	
163	103
Domicile of—as affected by change of residence, 167, 168.....	108
How—is cited, when sued in parish other than domicile, 183,	
184	117
Service of citation on—and return, 185 186.....	118
Proceeding void, unless—is cited, 206.....	125
If—die pending appeal, heirs may be made parties to suit, 903	
.....	712

DEMAND

See CUMULATION, EXCEPTION, INCIDENTAL DEMANDS, RECONVENTION, PETITION, WARRANTY, COMPENSATION, DOMICILE.

In hypothecary action thirty days—necessary, 69.....	40
and there must be affidavit thereof, 70.....	41
Definition of, 147	94
Principal and incidental, 153.....	97
Jurisdiction of incidental, 154.....	97
Result of excessive, 155.....	98
of less than due, loss of overplus, 156.....	98
Failure to—interest, waives it, 157.....	98
If—premature, action will be dismissed, 158.....	99
Effect if—not made at proper place or time, 158.....	99
Incidental—must be in writing, may be verbal, before justice,	
159	99
No prescribed form for, 160.....	99
—must express clearly what is wanted, 161.....	100
Amicable—in writing not necessary before suit, 169.....	109
—in writing called petition, 170.....	109

DEPOSIT (See TENDER)

When debtor may make, 412	317
When—must be made, notice to creditor, 413.....	317
After—thing at risk and cost of creditor, 414, 415.....	318

DEPOSITION (See COMMISSION TO TAKE TESTIMONY)

—of sick witness, when and how taken, 467.....	346
--	-----

DEPUTIES

Sheriff may appoint—with consent of court, 764.....	36
represent him, coroner cannot appoint, 771.....	36
Clerks of court may appoint, 782.....	35

DEVOLUTIVE APPEAL (See APPEAL)

What is, and bond, 578.....	45
-----------------------------	----

DIES NON

See LEGAL HOLIDAYS.

DILATORY EXCEPTION

Definition of, 332	36
—must be pleaded before answer or default, 333.....	36

DIRECT ACTION

—arises immediately from contract and binds all parties to it, 34	36
—as distinguished from contrary action, 36.....	34
—arises from contract itself, 37.....	34

DISCONTINUANCE

Plaintiff may take—at every stage of suit previous to judgment, 491	37
After—plaintiff may renew suit, 492.....	37
Plaintiff may take—up to withdrawal of jury, 532.....	37

DISCUSSION

Third possessor in hypothecary action may demand—when, 71 ..	41
Must designate property or debtor and advance costs, 72....	41
No discussion against holder of privilege or special mortgage. 73	42
—not allowed surety on injunction bond, 304.....	43
Surety on appeal bond may plead, 596.....	466 et seq.
When purchaser at judicial sale may demand, 711.....	355

DISTRICT COURT

See COURTS, COMPETENCY, JUDGE, JURISDICTION, APPEAL

DISTRINGAS

	PAGE.
When writ of—lies, 636.....	498
How writ of—is executed, 637 to 640.....	498, 499
—lies to enforce <i>mandamus</i> against corporations, etc., 844....	643
—lies where tutor, etc., fails to account, 1011, 1012.....	759
—lies against executor, etc., in certain cases, 1058.....	774

DISTURBANCE

What constitutes—for possessory action, 50 to 52.....	30
---	----

DOCKETS OF COURT

—for summary cases, 756	591
—for summary cases in Supreme Court, 879.....	686

DOMICIL

Defendant must be sued at, 162.....	100
Exceptions to rule of, 165.....	105
Declarations and changes of, 168.....	108
when changed, where defendant cited.....	108, 118
Return where service is domiciliary, 189.....	118, 119
In suits in compensation—of plaintiff controls, 372.....	288
As to rule of—in reconventional demands, 375 to 377... ..	290 to 292
Warrantor must appear at place of main action, 380, 384..	295, 296

DOTAL PROPERTY

Wife may sue to recover, 107.....	64
-----------------------------------	----

ELECTION

Necessity of—where plea of inconsistency is maintained, 152..	97
---	----

EMANCIPATED MINOR

Service on—is made like on major, 197.....	121
--	-----

ENDORSERS

See NOTES.

EQUITABLE ACTION

When—arises in favor of third person, 35..... 31

ERROR

Action lies to recover what is paid in, 18..... 15
Assignment of—office of in appeals, 897..... 700

EVICTION

Recourse of purchaser at sheriff's sale who suffered, 711.... 355
against whom recourse may be had, 713..... 356
when and how right of recourse is lost, 714..... 356

EVIDENCE

See WITNESSES, SUBPOENA DUCES TECUM; see COMMISSIONERS
TAKE TESTIMONY, TRIAL, NEW TRIAL, STATEMENT OF FACTS,
INTERROGATORIES ON FACTS AND ARTICLES.

Books and documents as—how brought into court, 140..... 31
Answers to interrogatories on facts and articles are, 354..... 37
Objection to—at trial, how made and preserved, 483..... 353
No—received after argument except by consent, 484..... 353
When testimony taken in parish, may be used on appeal to
District Court, 586..... 45
Either party may require clerk to take down, 601..... 47
How statement of facts is made, 602, 603..... 470, 471
Certified copy of sheriff's act of sale as, 698..... 353
Certified copies of foreign judgments as, 752, 753..... 353
No new—received in Supreme Court, 894..... 353
Depositions in writing as—of execution of will, etc., 945..... 353
—in probate courts must be in writing, 1042..... 353

EXCEPTION

See DILATORY EXCEPTIONS, DECLINATORY EXCEPTIONS, PEREMPTORY
EXCEPTIONS.

Cause of action may be used as, 20..... 35
—of inconsistent demands, 152..... 35
—to want of authority to sue, 320..... 35
—of oyer, etc., 321..... 35
—to jurisdiction, 322..... 35

EXCEPTION—*Continued.*

	PAGE.
Definition of, 330	257
—are dilatory or peremptory, 331	258
Dilatory—merely retard proceeding, 332	258
and must be pleaded before issue joined or default, 333...	258
Declinatory—object of, 334	261
jurisdiction or <i>lis pendens</i> , 335	261
when they must be pleaded, 336	262
Peremptory—definition of, 343	270
relating to form, 344	270
relating to law, 345	271
where and how they must be pleaded, 346	271
may be pleaded in Supreme Court, 902	709
—to witnesses at trial, 480	351
—to ruling in objection to testimony at trial, 481	351
—to ruling generally at trial, 487	354
Form of bill of, 488	355
Settlement of bill of, 489	357
—to ruling of judge on challenge of jury, 510	369
—to charge of judge to jury, 517	372

EXCLUSIVE JURISDICTION

See JURISDICTION, COMPETENCY.

EXECUTION OF JUDGMENTS

See FIERIE FACIAS, POSSESSION, DISTINGAS, SALE, IMPRISONMENT
FOR DEBT, THIRD OPPOSITION, PROHIBITION.

Garnishment on, 246 (See FIERIE FACIAS)	156
What court orders, 617	487
Courts of first instance order, 618	489
No—until recorded in court of first instance, 619	492
Mandate of Supreme Court, recording of, etc., 620	490
Beneficiary controls, 621	491
In unappealable cases—issues at once, 622	492
—follows recording in court of first instance, 622	492
When—may be had in appealable cases, 624	492
—how obtained, 625	493
Order for—must be signed and dated, 626	494
Reception of—must be endorsed by sheriff, 627	495

EXECUTION OF JUDGMENTS—*Continued.*

	PAGE
Procedure in, 628	485
Manner of—to be determined by court rendering judgment, 629	485
Privilege of seizing creditor, 724, 725	560, 561
Supreme Court sends its judgment to lower court for, 915...	739
When—may be had against tutor, executor, etc., 994, 1057	754, 755
—of justice of the peace court, 1139 <i>et seq.</i>	738, 739

EXECUTORS

See LEGATEES, HEIRS, SUCCESSION, ACCOUNTS.

Suits against—continue in their own name after gestion ceases, 120	71
—may be sued alone in personal actions, 123	71
heirs must be joined in real actions, 123	71
Removal of—how obtained, 1014	761
Who may obtain removal of, 1015 to 1019	761, 762
No suspensive appeal from judgment appointing or removing, 1059	774
When execution issues against, 994, 1057	754, 755
Distringas against, 1058	734

EXECUTORY PROCESS (See HYPOTHECARY ACTION)

—to enforce mortgage, 63 to 65	37, 38
Definition of, 98	3
No citation in, 206	13
Provisional seizure will issue in, 285	34
Privilege conferred by, 725	54
Instances in which—may be resorted to, 732	52
What is confession of judgment necessary for, 700	50
—issues without citation, 734	50
Three days notice necessary for, 735	51
What judge issues writ of, 736	51
Attorney may be appointed to represent absent debtor in, 737	51
Injunctions to stay—how obtained, 738	52
Instances when injunction to stay—will issue, 739	290, 52
When injunction to stay—will issue without bond, 740	52

EXECUTORY PROCESS—*Continued.*

	PAGE.
Summary trial of injunction to stay, 741.....	575
If injunction successful, order for—revoked, 742.....	576
otherwise injunction dissolved, 743.....	576
Appraisement of property seized under, 745.....	577
Issues on judgments of other parishes, etc., 746.....	578
even if judgment has been obtained by default or attach- ment, 747	580
Injunction of—on judgments, 749.....	581
Bond in such cases, 750.....	581
Hearing of such injunction, 751.....	582

EXEMPTIONS FROM SEIZURE

What subject to, 644.....	529
—in justice of the peace court, 1140.....	799

EX PARTE ORDERS

What—will be set aside, etc.....	126
----------------------------------	-----

EXPERTS

See AUDITORS, ACCOUNTS, JUDICIAL ARBITRATIONS.

When—will be appointed to appraise property, 261.....	177
—to examine signature or handwriting generally, 325.....	251
Definition of, 441	333
When—will be appointed, 442.....	334
Parties each name an—and court appoints umpire when they fail to agree, 446	336
By consent of parties, one—may be appointed, 447.....	336
Appointment, oath, etc., of, 448.....	336
Appointees refusing to serve, must immediately notify court, 449	337
No resignation of—after acceptance of appointment and oath, 450	337
Witnesses may be summoned before, 451.....	338
Liability in damages for failure of—to act, 452.....	338
Report of—and signature thereof, 453, 454.....	338
Report of—must be clear, 455.....	339

EXPERTS—*Continued.*

Rule to homologate report of, 456.	721
opposition to homologation, 457.	722
Report of—not conclusive on court, 458.	723
How oppositions to report of—are tried, 461.	724
Compensation of, 462.	725
Motion to homologate report tried summarily, 755.	726

FACTS AND ARTICLES

See INTERROGATORIES ON FACTS AND ARTICLES.

FAMILY MEETING

—To advise appointment of dative tutor, 957.

FALSE IMPRISONMENT

When action for—may be brought, 815.

FAILURE

Suits relative to—where instituted, 165.	727
No bond for sequestration in case of—etc., 299.	728

FEES

See COSTS.

FIERIE FACIAS (See EXECUTION, DISTINGAS, SALE, IMPRISONMENT
FOR DEBT, CESSIÖN.)

Garnishment under, 246.	729
Writ of—issues when judgment is for sum of money, 641.	730
Garnishment under—return and reduction of seizure, etc, 642.	731
What property may be seized under writ of, 643.	732
What property is exempt under writ of, 644.	733
Agricultural implements, homesteads, etc., 645.	734
Movables seized first under writ of—then immovables, 646.	735
Seizure of rights, credits, money in default of other property.	
647.	736
When debtor may not point out property for seizure, 648.	737
Right to point out property lost after levy of writ of—, 649.	738

FIERIE FACIAS—*Continued.*

	PAGE.
Debtor may designate portion of realty to be sold, 650.....	522
Extent of seizure under writ of—, 651.....	522
Reduction of seizure made under writ of—, 652.....	523
appraisement, etc, 653.....	523
Notice of seizure under writ of—, 654.....	524
Delay allowed after notice of seizure, 655.....	525
Seizure of houses and lands include rents, 656.....	525
Administration by sheriff of property seized, keeper, etc., 657..	527
sheriff collects rents, 658.....	528
Movables seized must be safely kept, etc, 659.....	528
Immovables by destination may not be removed, 660.....	528
Expense of administration of property seized under writ, 661..	529
Sheriff may not hire out animals seized under writ, 662.....	529
Return of sheriff on writ of—duration of writ, etc., 700.....	551
suspension of return, when writ enjoined, 700.....	551
Writ must be returned immediately after sale, 701.....	552
recitals of return, 702.....	552
Writ issues to enforce payment of twelve months bond, 719,	
720	558, 559
recitals of such writ, 721.....	559
Seizure under writ—confers privilege, 722.....	559
privileges rank in order of levy, 723.....	559
Proceedings where writ of—returned <i>nulla bona</i> , 726 to 727..	560
When <i>alias</i> writ of—will issue, 728.....	561
When judgment creditor may force cession, etc., 729.....	561
when he may have <i>capias</i> against public officer, 730.....	562
Writ of—issues on judgment of justice of peace, 1139.....	798
several writs will issue at same time to different parties,	
1139	798
exemptions thereunder, 1140.....	799
Constable must keep property safely, 1141.....	799
may take forthcoming bond, 1141.....	799
may appoint keeper only with written consent of debtor,	
1142	800
Sale by constable of property seized, 1143.....	800
Constable may seize immovables in absence of movables, 1144.	801
Appraisement of property seized by constable, 1145.....	801
Return on writs of—, 1147.....	801
Seizure in other parishes under writs of—, 1148.....	802
Proceedings where writ returned <i>nulla bona</i> , 1150, 1151.....	802

FINES OF COURT

	Page
—imposed for contempt of court, 131.....	5
—may be imposed on attorneys for contempt, 132.....	6
—may be imposed on all officers, jurors, etc., 133.....	6
—may be imposed on recalcitrant witnesses, 135.....	9
Clerks, sheriffs, etc., responsible personally for collection of—	
132	3
Sheriff must recover—, 768.....	60
Penalty for failure to pay over, 769.....	60

FIXING OF CASES

See TRIAL.

FOREIGNERS

—may be sued wherever found, 165.....	14
---------------------------------------	----

FOREMAN OF JURY

Court names—when jury completed, 514.....	37
—must write and sign verdict, 518, 525.....	372, 373
—must hand verdict to judge, 526.....	373

FORM OF ACTION (See ANSWER, PETITION, EXCEPTIONS)

—governed by <i>lex fori</i> , 13.....	3
No distinct or peculiar—for written demand, 160.....	9

FORTHCOMING BOND (See ATTACHMENT, SEQUESTRATION)

—by plaintiff in provisional seizure.....	25
When intervenor may give.....	173, 194, 25
constable may take—for seizure under <i>fi. fa.</i> , 1141.....	79

FRAUD

—as cause for nullity of judgments, 607.....	47
Prescription of action therefor, 613.....	44

GARNISHEE

	PAGE.
Service of interrogatories on—must be personal, 246.....	157
Interrogatories on—, 247.....	163
When—may be arrested, 247, 248.....	163
How—may be discharged from arrest, 249.....	164
How—in attachment may be made party to suit, 250.....	164
But—under <i>fierie facias</i> is not party to suit (<i>Marqueze vs. Le-Blanc</i> , 29 A. 194.)	
Citation on—, 251.....	164
Answer of—, 252.....	178
Penalty for refusal or neglect of—to answer, 263.....	178
Traverse of answer of—, 264.....	178

GARNISHMENT (See ATTACHMENT, FIERI FACIAS, EXECUTION)

Definition of—, 239.....	140
—may issue under attachment and <i>fierie facias</i> , 246.....	156
—in justice of the peace court, 1122 <i>et seq.</i>	791

GENERAL DENIAL

See ANSWER, SIGNATURE.

HABEAS CORPUS

Courts may issue writs of—, 786, 787.....	611
Definition of—, 791.....	612
By whom—is issued, 792.....	613
When—is issued by judge of adjoining district, 793.....	613
Proceedings to obtain writ of—, 794.....	614
Recitals of petition for—, 795.....	614
Other requisites for petition, 796 to 798.....	614
Prayer of petition for—, 799.....	615
Order on petition for—, 800, 801.....	615
by whom served, 802.....	615
how it may be served, 803.....	615
how service is shown, 804.....	616
Return of writ and order, 805.....	616
What constitutes compliance with writ, 806.....	616
Answer of respondent in writ of—, 807.....	616
recitals of answer, 808.....	616

HABEAS CORPUS—Continued.

	PAGE
When order for arrest must be annexed to answer, 809.....	616
Answer must be signed and sworn to, 810.....	617
When body need not be produced, 811.....	617
but judge may order production, 812.....	617
Writ is returnable in twelve hours, 813.....	617
Respondent's failure to comply punished by court, 814.....	617
extent of punishment, 815.....	618
Return when person held is sick, or production otherwise im- possible, 816	618
when dead, 817.....	618
Hearing of matter is summary, 818, 819.....	619
Sheriff has charge of person pending decision, 820.....	619
Cases in which person will be set at liberty, 821.....	620
When new order for arrest will issue, 822.....	621
When prisoner will be liberated, 823.....	621
To whom person will be delivered, when writ refused, 824....	622
When released person may be re-arrested, etc., 825, 826.....	622

HEIRS

See CURATOR, TUTOR, SUCCESSION, MINORS, HYPOTHECARY ACTIONS.
PARTITION, INVENTORY—BENEFIT OF.

—may continue inherited actions in their own name, 22.....	13
—are entitled to same actions, etc., as ancestor, 23.....	13
—are subject to same civil obligations as ancestor, 25, 40....	13, 22
Hypothecary action against—, 65 to 67, 121.....	37, 38, 77
Demand on—necessary before hypothecary action, 69.....	40
—may sue debtor of ancestor, 113.....	65
How—are made parties, 120.....	76
—if represented, must be joined in real actions with executor, 123	79
but not in personal actions, 123.....	79
and if present, in all actions against curators of vacant es- tates, 122	75
In partition—may be sued where succession is opened, 164....	104
—may be made parties after issue joined, 361.....	283
How—may have benefit of inventory, 974.....	742
Renunciation and acceptance of succession by—, 977 to 980..	744
—may have time to deliberate, etc., 981, 982.....	745
Actions against—where instituted, 996.....	734

HEIRS—Continued.

	PAGE.
Presentation of claims by—, 1000, 1001.....	756
summary trial of claims, 1002.....	756
—may be put in possession and have account, 1003.....	756
when objection to account must be filed, 1004.....	757
account may be referred to auditor, 1005.....	757
who pays costs of proceeding, 1006	757
curator, etc., may be ordered to pay balance, 1007.....	758
When counsel for absent—will be appointed, 1009, 1010.....	759
How—may compel accounting, 1012.....	759
How counsel for absent—tutors, etc., may be removed, 1013, 1014	760, 761
who may demand removal, 1015 to 1019.....	761, 762
Counsel for absent—may sue for removal of curator, 1019....	762
—may force co-heir to partition, 1024 to 1026.....	764

HOMESTEADS (See EXEMPTIONS, EXECUTION.)

Exemption of—from seizure, 645.....	513
-------------------------------------	-----

HOMOLOGATION

See SUCCESSIONS, EXPERTS, AUDITORS, JUDICIAL ARBITRATORS, ACCOUNTS, TUTORS, AND OTHER OFFICIAL REPRESENTATIONS OF PERSONS—PARTITION.)

HUSBAND

Wife cannot sue—during marriage, exceptions, 105.....	62
Wife must be authorized by—to sue, exceptions, 106.....	63
When—sues in his own name for wife, exceptions, 107.....	64
Minor—may sue without curator, 110.....	67
Minor—may be sued, 114.....	69
—must be joined with wife in suits against her separate interests, 118.....	74
One petition and citation for—and wife, 182.....	117
When wife may enjoin—, 298.....	213
service on notary in such cases, 306.....	232

HYPOTHECARY ACTIONS (See EXECUTORY PROCEEDINGS)

Definition of—, 61.....	33
—follows property, 62	36

HYPOTHECARY ACTIONS—*Continued.*

	PAGE
—where title imports confession of judgment, 63.....	51
—against heirs, 65 to 67, 121.....	37, 38, 39
—against third persons, 68, 744.....	59, 57
Demand against third persons in—, 69.....	41
must be shown by affidavit, 70.....	41
when third possessor entitled to discussion, 71.....	41
requisites for discussion, 72.....	42
Payment of debt by third person abates—, 74.....	42
Where—against heirs may be instituted, 163.....	70
—lies against purchasers at judicial sales, 709.....	55

IMMOVABLES

See POSSESSORY ACTIONS, PETITORY ACTIONS, HYPOTHECARY ACTIONS, FIERIE FACIAS, EXECUTION, SALES.

IMPRISONMENT FOR DEBT (See ARREST, *Habeas Corpus*.)

—for failure to make cession, etc., 729.....	51
—of public officers, for failure to pay over official funds, 730.....	52
—of absconding debtors, 731.....	52
—of tutor, etc., for failure to account, 1011, 1012.....	13

INCIDENTAL DEMANDS (See DEMANDS)

—may be urged by defendants, 328.....	53
No replication to—by plaintiff, 329.....	53
Defendant may make—against plaintiff or third parties, 362.....	53
what—he may make, 363.....	54
Intervenors may make—, 364.....	54
—must be made in writing, 365.....	54
Judgment in—carries costs, 550.....	54
even where not decreed, 551.....	54

INCONSISTENT DEMANDS

See EXCEPTION.

INCORPOREAL RIGHTS (See GARNISHMENT)

Action for—governed by nature of property to which they relate, 12.....	4
---	---

INJUNCTION (See EXECUTORY PROCESS, JUDGMENTS)

	PAGE.
Definition of—, 296.....	210
—may issue to defendant or third persons, 297.....	212
When—will issue against defendants, 298.....	213
When—will issue against third persons, 299 to 303.....	224, 225
—by privilege creditor to prevent payment, etc., 300.....	224
—to enforce concurso, 301.....	224
—to prevent disposal of property in certain cases <i>pendente lite</i> , 302	225
—to prevent waste or injury to property in dispute, 303....	225
When a purchaser may have—against seizure by vendee, 303	225
Petition, affidavit, etc., for—, 304.....	226
Surety on bond is party to suit, etc., and damages, 304.....	226
Service of petition, etc., for—, 305.....	232
on notaries to prevent disposal of property in dispute, 306..	232
to prevent husband from selling property in certain cases, 306	232
Dissolution of—by bonding, 307.....	233
Violation of—, penalty, 308.....	237
Return of bond for dissolution of—into court, 309.....	238
—in case of third opposition, 300, 399.....	224, 310
When—lies to enjoin executory process, 738, 739....	220, 572 573
when it will issue without bond, 740.....	575
summary trial thereof, 741.....	575
Order for executory process revoked, if—maintained, 742....	576
otherwise—dissolved, 743.....	576
—of executory process on judgments, 748, 749.....	580, 581
bond in such cases, 750.....	581
hearing of—in such cases, 751.....	582
<i>Certiorari</i> may be accompanied by—, 856.....	656
—in justice of the peace court, 1096.....	785, 870

IN REM (See CITATION, DOMICILE, ABSENTEE)

Provisional seizure issues in proceedings—, 285.....	200
Seizure of ships, etc., by material men, etc., 289.....	206
defendant or claimant may bond, 289.....	206, 207
When proceeding—permitted, 290.....	208
Recitals of petition and oath for proceedings in—, 291.....	209
Order for writ in proceedings in—, 292.....	209

IN REM—Continued.

	PAGE
Advertisement of notice of proceedings—, 293.....	300
Advocate appointed to represent absent owner—, 294.....	310
Privilege conferred by proceeding—, 725.....	560

INSOLVENCY (See CITATION, DOMICILE, FAILURE, ARREST, CESSION,
Fieri Facias)

Actions relating to—where brought, 165.....	105
When surety for release of arrested insolvent, may arrest him , 233, 234	138, 139

INTERDICTS (See CURATOR, TUTORS, PARTITION, ACCOUNT, DE-
TRINGAS)

—cannot sue except through curator, 108.....	65
Curators sue for—in name of—, 109.....	66
—are sued through curator, 115.....	69
Service of citation on—, 191, 194, 195.....	120, 121
No arrest of—in civil matters, 211.....	129
Curator of—controlled by rules applicable to tutors, 962.....	753
penalty for failure to render account, 1011, 1012.....	759
Curator of—may be removed by court, 1013.....	760
how he may be removed, 1015 to 1019.....	760, 761

INTEREST (See TENDER, DEPOSIT)

Failure to demand, waives—, 157, 553.....	98, 400
and cannot claim it in separate suit, 157.....	98
Defendant released from—after tender, 415.....	313
Five per cent—allowed from maturity of debt, exception , 554..	400
—on claims against succession, 989.....	750
When—is due by curator, executor, etc., 1007.....	753

INTEREST IN SUIT (See RECUSATION, INTERVENTION)

Party must have real and actual, 15.....	7
—of judge is cause for recusation, 338.....	263
—justifies intervention, 390.....	301

INTERLOCUTORY JUDGMENTS (See JUDGMENTS, APPEAL)

	PAGE.
What are—, 538.....	388
When appeal lies from—, 566.....	417

INTERROGATORIES

See GARNISHEE, GARNISHMENT)

INTERROGATORIES ON FACTS AND ARTICLES

—may be annexed to petition or answer, 347.....	273
Definition of—, 348.....	273
Party interrogated on—must answer, 349.....	274
need not incriminate himself, 349.....	274
Women need not answer in open court, exception, 349.....	274
How order for answering—obtained, 350.....	276
objections which may be urged to answering, 350.....	276
When—must be answered in open court, 351.....	277
Party residing out of parish must file answers, within term fixed by court, 352.....	278
Resident of another State must answer—by commission, 352..	278
How—must be answered, 353.....	278
Effect of answers to—, 354.....	279
Taken as confessed when not answered, 349, 350.....	274, 276
When—may be issued, 355.....	280
—are indivisible, 356.....	280

INTERVENORS (See INCIDENTAL DEMANDS, INTERVENTION)

—are parties to suits, 101.....	51
—may bond ships, etc., provisionally seized, 289.....	207
—may bond all conservatory writs.....	173, 194, 207

INTERVENTION

Definition of—, 389.....	298
Who may file—, 390.....	300
—allowed any time, but must not retard suit, 391.....	302
Forum for—, 392.....	303
How—is had and service thereof, 393.....	303
—must be allowed, 394.....	304

INTERVENTION—*Continued.*

	PAGE.
Silence of judgment on—is dismissal.....	304
When—must be decided.....	304
Dismissal of principal action, works dismissal of—	305
Appeal lies from dismissal of intervention.....	305

INVENTORY

Sheriff must make—in attachment, 257.....	167
in sequestration, 282.....	197
in provisional seizures, 287.....	202
Register of wills in New Orleans makes—of succession prop- erty, 1046	771

INVENTORY. BENEFIT OF (See HEIR, SUCCESSION)

How heir may obtain—, 974.....	742
Judge appoints notary to make inventory, 975.....	742
Pending deliberation and making—administrator appointed, 976	742

ISSUE JOINED (See HEIRS)

When—, 357.....	281
When not—, 358.....	281
—is foundation of suit, 359.....	282
Tacit joinder of issue by default, 360.....	282
Death of party does not abate suit after—, 361.....	283

JAILOR IN JUSTICE COURT (See CONSTABLE, JUSTICE OF THE PEACE)

—to keep imprisoned debtor, 1106.....	737
creditor must pay charges of—in advance, 1106.....	737
Fees of—may be demanded before arrest of debtor, 1107.....	737

JOINT OBLIGORS

—may be sued at domicile of either, 165.....	106
--	-----

JUDGES (See COMPETENCY, COURTS, JURISDICTION, RECUSATION, JUSTICE OF THE PEACE)

	PAGE.
Competency of—, 86.....	45
Tests of competency of—, 87.....	45
Object or amount in controversy, 88.....	46
domicile of defendant, 89.....	46
place where action is brought, 90.....	46
—may authorize wife to stand in judgment, 105, 106, 118...62, 63, 74	
—have necessary powers by implication, 130.....	86
—may punish contempt of court, 131, 132.....	87, 88
—may punish officers of court and jurors, 133.....	88
—may subpoena, attach and fine witnesses, 134, 135, 136....	89, 90
—may issue commissions to take testimony, 138.....	90
—may issue writs of subpoena <i>duces tecum</i> , 139, 140, 141..	90 to 92
—may order arrest, attachments, etc., 144.....	92
—may make rules, 145.....	93
—may recuse themselves and be recused (See RECUSATION)	

JUDGMENT

See APPEAL, NULLITY OF JUDGMENTS, NEW TRIAL, INTEREST, RESCISSION, EXECUTION, DISTRINGAS, FIERIE FACIAS, DEFAULT, CONFESSION OF JUDGMENT, POSSESSION.

Confession of—in hypothecary actions, 63 to 67.....	37, 38
—against curators of vacant successions are valid, 122.....	78
—carries costs, even if not decreed, 157.....	98
—and execution in attachment suits, 265.....	179
Injunction of execution of—, 304.....	226
—by default, 310.....	240
how obtained, 311.....	240
Confirmation of—by default, 312.....	240
Jury to assess damages for—by default, 313.....	242
Setting aside—by default, 314.....	243
Grounds of—by default must be stated, 315.....	244
—against warrantor, how executed, 386, 387.....	297
execution of—may be enjoined by third opposition, 395.....	305
—may be rendered on trial or thereafter, 490.....	357
—is rendered on default or after hearing parties, 533.....	378
—is certain or conditional.....	378
When collateral attack on—not permitted.....	378, 379
when attack is not collateral.....	380

JUDGMENT—*Continued.*

When collateral attack is permitted.....	321
What confession of—is, etc.....	32
—is null if rendered before issue joined or against dead man.....	32
When silence of judgment equivalent to rejection of interven- tion, etc.	382, 38
when not	38
—bind only parties thereto.....	38
Original claim merged in—which confers no new rights, etc.	383, 38
Prescription of foreign—	384, 38
Interpretation of—	38
Definition of—by default, 534.....	38
of—contradictorily rendered, 535.....	38
of non-suit, not <i>res adjudicata</i> , 536.....	38
What are interlocutory—, 538	38
mandates or orders have effect of—, 539.....	38
When—must be rendered after general verdict of jury, 541.....	38
where verdict special, court may have time to consider, 542.....	38
—must be read in open court, 543.....	38
All—must be entered on minutes of court, 544.....	38
Judicial mortgage, results from recording of—in mortgage office, 545	38
When—must be signed, 546.....	38
Amendment of—, 547.....	38
—is property of creditor, 548.....	38
Party cast in—pays cost, 549.....	38
even if not decreed, 551.....	38
what costs are taxed, 552.....	38
Interest on—, 553, 554.....	38
When—takes effect, 555.....	38
Revision of—, 556.....	38
When notice of—must be given, 575.....	38
Executory process issues to enforce—of sister parishes, 746.....	38
even if—has been obtained by default or attachment, 747.....	38
Injunction of executory process on such—, 748.....	38
causes for such injunction, 749.....	38
bond in such cases, 750.....	38
Summary hearing of injunction, 751.....	38
When—of sister states import full proof, etc., 752.....	38
Requisites of copies of such judgments, 753.....	38

JUDICIAL ARBITRATORS

	PAGE
Cause will be referred to—at request of both parties, 444....	335
but cannot be by court, or at request of only one party, 445..	336
How—are appointed, court names umpire if necessary, 446....	336
When one—may be appointed, 447.....	336
Notice of appointment to and oath of—, 448.....	336
Refusal of—to serve, 449.....	337
No resignation of—after oath, etc., 450.....	337
Witnesses may be summoned before—, 451.....	338
Liability of—for failure to act, after acceptance, 452.....	338
Report of—and signature thereto, 453, 454.....	338
Rule to homologate report of—, 456.....	338
opposition to homologation of—, 457.....	338
Award of—not conclusive, 459.....	340
unless they acted as amicable compounders, 460.....	341
Trial of opposition to report of—, 461.....	341
Compensation of—, 462.....	341
Summary trial of opposition to homologate award of—, 755...	507

JUDICIAL MORTGAGE

Recording judgment in mortgage office gives creditor—, 545..	391
--	-----

JUDICIAL SALES

See SALES)

JUDICIAL SEQUESTRATION

See SEQUESTRATION)

JURISDICTION (See COURTS, COMPETENCY, JUDGE, JUSTICE OF THE
PEACE, PROBATE COURT, SUPREME COURT, DOMICILE, REAL AC-
TIONS, PERSONAL ACTIONS, SUCCESSIONS)

Definition of—, 76 to 78.....	43, 44
Civil and criminal—, 79, 80.....	44
Special and general—, 81.....	44
Exclusive and concurrent—, 82, 83.....	44, 45
Original and appellate—, 84, 85.....	45
Amount claimed fixes—, 91.....	47
Consent cannot vest— <i>ratione materiae</i> , 92.....	47

JURISDICTION—*Continued.*

	PAGE
When— <i>ratione personae</i> may be waived, 93	46
What forum has—to settle conflict of privileges, 126.....	53
Territorial limits of—, 129.....	86
—of principal and incidental demands, 154.....	97
Exception to—, 322.....	244
is declinatory, 335	261
—when compensation is basis of suit, 372.....	266
—when suit is in reconvention, 376.....	292
—when party called in warranty, 384.....	296

JUROR (See JURY)

When—may be punished by judge, 133.....	88
Challenge of—because not qualified elector, 506.....	368
for other causes, 507.....	368
for crime, 508.....	369
Examination of challenged—, 509.....	369
Ruling of judge on challenge of—, 510.....	369
exception thereto, 511.....	369
Number of peremptory challenges of—, 512, 513.....	369
Talesmen to complete number of—, 514.....	370
Oath of—and foreman, 515.....	370
Proceeding where—falls sick pending delivery of verdict, 530..	377
where—dies after voting, 531.....	378

JURY (See JUROR)

When—assess damages in judgment by default, 313.....	342
Selection of—controlled by special laws, 493.....	359
When trial by—allowed, 494.....	359
not after case fixed for trial, 495.....	363
How—is drawn, 496.....	364
Selection and listing of—, 497.....	364
—must be drawn for each case, except drawing waived, 498...	364
How—is called and sworn, 499.....	364
Challenges of—in general, 500.....	364
to array, to poll, 501, 502.....	365
for cause, 503.....	365
Public official exempt from service on—, 505.....	368

JURY—Continued.

	PAGE.
Mode of trial before—, 515.....	371
Charge of judge to—, 516.....	371
exceptions to charge, written charge, 517.....	372
Verdict of—, 518.....	372
may be special or general, 519.....	373
—may always render general verdict, 520.....	373
Special verdict, new trial, 521.....	373
Form of general verdict of—, 522.....	374
Costs follow judgment based on general verdict of—, 523....	375
Form of special verdict of—, 524.....	375
Foreman must sign verdict of—, 525.....	375
Polling of—, 526.....	376
Number necessary for verdict, 527.....	376
Form of verdict of—may be corrected, 528.....	376
Sealed verdict of—, 529.....	377
Plaintiff may discontinue up to withdrawal of—, 532.....	377
After general verdict of—judgment must be rendered within three days, 541.....	389
Where verdict is special, court may take time to consider, 542..	389
No—in summary cases, except where right to office involved, 757	591
nor in probate cases, 1036.....	768

JUSTICE OF THE PEACE (See CONSTABLE, DEMANDS)

—may issue commissions to take testimony, 138, 425, 1155....	90, 325 <i>et seq.</i> , 805
Demands before—may be oral, 139.....	99
—may administer oath for arrest, etc., 216.....	133
—may take declaration of sick juror how he voted, 530.....	377
—has jurisdiction in civil and criminal matters, 1060.....	775
Exclusive original jurisdiction of—, 1061.....	775
How jurisdiction of—is fixed, 1062.....	776
Extent of jurisdiction of—, 1063, 1064.....	776
—may employ sheriff to execute orders, etc., 1065.....	776
jurisdiction of— <i>ratione materiae et personae</i> , 1066 to 1069....	777
Territorial limits of jurisdiction of—, 1070.....	778
When no appeal lies from judgment of—, 1071.....	778
Recusation of—, 1072.....	779

JUSTICE OF THE PEACE—*Continued.*

	PAGE
Proceedings before—are verbal, 1073.....	73
Record which—must keep, 1074.....	73
Mode of proceeding before—, 1075 to 1077.....	73
Citation, service, etc., in courts of—, 1078.....	73
on mariners, 1079.....	73
Return of constable on service, 1080.....	73
Constable is witness to return, 1081.....	73
When answer must be filed, 1082.....	73
Answer must be recorded, 1083.....	73
Trial, continuance, judgment, etc., 1085.....	73
No notice of judgment, when both parties present, 1086.....	73
Parties may appear in person or by counsel, 1087.....	73
How testimony of parties may be taken, 1088.....	73
Pleas to jurisdiction <i>ratione materiae</i> and appraisement, 1089.....	73
Appeal from judgment of—, 1090.....	73
Plea of compensation before—, 1091, 1092.....	73
of reconvention, balance, etc., in such case, 1093.....	73
Prior tender of claim, costs, etc., in such case, 1094, 1095.....	73
—may issue conservatory writs, 1096.....	73
—may order arrest of debtor, 1097, 1098.....	73
oath, bond, writ, etc., 1099 to 1115.....	736 to 79
Attachment in court of—grounds, affidavit, bond, etc., 1116 to 1121.....	739 to 73
Garnishment and answer in court of—, 1122, 1123.....	791 73
Sequestration before—, 1124.....	73
Provisional seizure before—, 1125.....	73
When agent may make oath for conservatory writs, 1126.....	73
Bonding conservatory writs, 1127.....	73
Appeals from judgments of—, 1128 to 1138.....	794 to 73
Execution of judgments of—, 1139 to 1151.....	798 to 73
Implied powers of—, 1152.....	73
may attach and fine witnesses, 1153.....	73
may punish contempts, 1154.....	73
may appoint curators <i>at litem</i> for minors in certain cases 1155.....	73

KEEPER

Sheriff may appoint—but is responsible for him, 657.....	57
When constable may appoint—and his compensation, 1142.....	51

GENERAL INDEX.

923

LABORERS' WAGES (See EXEMPTION)

	PAGE.
Provisional seizure will issue to recover—, 285.....	200

LEGAL HOLIDAYS

No citation can issue on—, 207.....	127
What days are—, 207.....	127

LEGATEES (See SUCCESSION, ACCOUNT)

—are entitled to same action as ancestor, 23, 24.....	18
Universal—are bound for obligations of ancestor, 25.....	18
—may demand declaration of heir, whether he accepts or renounces succession, 979.....	744

LESSOR

Provisional seizure will issue to secure claim of—, 285.....	200
Affidavit of—to obtain provisional seizure, 287.....	202
—right to bond property.....	207
—may seize property removed within fifteen days, 288.....	205
Provisional seizure by—in justice court, 1125 to 1127.....	793

LESSEE

May bond provisional seizure, 287.....	202
--	-----

LETTERS TESTAMENTARY

Probate court issues—, 924.....	724
—may be demanded by executor, 931.....	728
and failing to pray for them is presumed to decline trust, 931.	728

IN PENDENS

Effect of plea of—, 94.....	48
Plea of—is declinatory exception, 335.....	261

MANDAMUS

Courts may issue writs of—, 788 to 790.....	612
—is order directing performance of some specific act, 828....	622
To whom—will issue, 829.....	624
Object of—and when it will issue, 830.....	625

MANDAMUS—*Continued.*

When writ will not issue.....	62
where unavailing	63
where remedy is by appeal (but see Art. 831).....	63
to try right to office	63
where prohibition is proper remedy.....	63
where specially prohibited by law (Act 5 E. S. 1870).....	63
where proper showing is not made.....	63
to enforce mere contract obligation.....	63
other cases in which it will not issue.....	63, 64
where defendant officer vested with discretion.....	63, 64
Writ of—will issue to compel corporation to comply with contract made with parish, etc. (but see Art. 832).....	63
and generally to enforce ministerial duties of officers.....	630 to 64
Trial of writ is summary and may be had in vacation.....	63
Issue of—within discretion of judge, 831.....	63
even where there is other relief, 831.....	63
To whom writ will issue, 832.....	63
to private persons, corporations and officers, 832, 833.....	63
When it will issue to public officers, 834.....	63
when to corporations, 835.....	63
What courts issue writ of—, 836.....	63
When writ will issue to judges, 837, 838, 839.....	636 to 639, 64
when not	639 to 64
When writ lies to officers exercising <i>quasi</i> judicial functions...	64
Recitals of petition for—and oath, 840.....	64
Order for—is to perform act or show cause why not, 841.....	64
Return or answer to writ of—, 842.....	64
Peremptory writ issues where answer insufficient, 843.....	64
Service of writ—penalty for disobedience of—, 844.....	64
How writ is issued—seal of court, etc., 872.....	64
Issue of—by Supreme Court to complete transcript of appeal, 899	76
—to lower judge to make statement of facts, 900.....	74

MANDATES OF COURTS (See JUDGMENT)

—have effect of judgments, 540.....	30
-------------------------------------	----

MANDATE OF SUPREME COURT

—goes to lower court before execution of judgment, 620.....	49
---	----

MARRIAGE (See HUSBAND, WIFE).....

PAGE.

Wife cannot sue husband, during existence of—exceptions,	
105	52
During existence of—wife must be authorized to sue, excep-	
tions, 106	63

MASTERS (See *In Rem*, PROVISIONAL SEIZURE)

Service of citation on—of ships and vessels, 199.....	123
---	-----

MATERIAL MEN

Provisional seizure will lie for claim of—, 285.....	200
of ships, etc., in such cases, 289.....	206

MINORS (See TUTORS, PARTITION, ACCOUNT)

When—cannot sue parents, 104.....	62
—cannot sue except through tutors, etc., 108.....	65
Tutors sue in name of—without making them parties, 109....	66
—husbands may sue without curator, 110.....	67
—husbands may be sued, 114.....	69
Unrepresented —may be sued through curator <i>ad hoc</i> , 116....	70
—represented by under tutor, when interest opposed to tutor,	
117	74
One petition and citation for several—represented by one tutor,	
etc., 182	117
Service of citation on—, 191, 194, 195.....	120, 121
on emancipated minor, 197.....	121
No arrest of—in civil matters, unless emancipated, 211....	129
Exception lies to suit by—without tutor, 320.....	247
May appeal one year after majority, 593.....	462
Causes of rescission of judgment against—, 556, 615....	401, 486
Who appoints tutor for—, 944 to 946.....	731, 732
All persons should give information of necessity for appoint-	
ment of tutor to—, 947, 948.....	733
Who may be tutor of—, 949 to 953, 956, 957.....	733 to 736
Opposition to appointment and trial thereof, 954, 955.....	736
No curator <i>ad bona</i> or <i>ad litem</i> for—in any case, 958.....	737
Estates and persons of—placed in hands of tutor and under-	
tutors, 958	737

MINORS—*Continued.*

	PAGE
Tutor will be appointed to absent—, 959.....	73
Tutor's refusal to serve and trial of refusal, 960.....	73
—may be sued through tutor <i>ad hoc</i> , 964.....	73
How—may compel tutor to account, 999.....	73
—even if emancipated must be assisted by under tutor, unless married, 999	73
—may be arrested when a public merchant, 1115.....	73

MINUTES OF COURT

See CLERK OF COURT)

MIXED ACTIONS

What are—, 7.....	3
-------------------	---

MORTGAGE (See *HYPOTHECARY ACTION, EXECUTORY PROCESS, OFFER, SITUATION, SALE.*)

Conflict for priority of—what court has jurisdiction, 126.....	5
Certificate of—must be read by sheriff, at judicial sales, 678..	53
Notice of—must be given at judicial sales, etc., 679.....	53
Rights of holders of—where mortgage property is sold, 706 to 710	553 to 55
When act of—imports confession of judgment, 733.....	56
Right of holder of such—, 734.....	56
For enforcement of mortgage, etc., see titles noted above.	

MOVABLES

See EXECUTION, *FIERIE FACIAS*.

NATURAL OBLIGATIONS

No right of action to enforce—, 17.....	13
What is given in payment of—cannot be recovered, 18.....	13

NEGOTIABLE PAPER

See NOTES.

GENERAL INDEX.

927

NEW TRIAL

	PAGE.
Courts may grant—term for application of—, 557, 558.....	401
How—is asked for, 559.....	403
When—will be granted, 560.....	403
When affidavit necessary to obtain—, 561.....	405
When not necessary, 562	406
Evidence on—, 563.....	406
Motion for—must be tried summarily, 755.....	586

NON SUIT

Judgment of—not <i>res adjudicata</i> , 536.....	386
Plaintiff failing to appear, defendant may have—, 536.....	386

NON RESIDENTS (See JURISDICTION, DOMICIL, CITATION, FOREIGNER, ABSENTEES.)

—may be cited wherever found, 165.....	106
--	-----

NOTARIAL ACTS (See NOTARY, EXECUTORY PROCESS, CONFESSION OF JUDGMENT.)

When copy of—must be annexed to petition, 174.....	111
But service thereof not necessary, 174.....	111

NOTARIES

—not bound to produce original acts in answer to <i>subpoena</i> , 142	92
Unless genuineness of signature is attacked, 142.....	92
Service of injunction on—in certain cases, 306.....	232
—may be imprisoned for refusal to produce will, 937.....	729
—make inventory of succession property, 975.....	742
Partition proceedings before—, 1027, 1028.....	764, 765
When—makes supplemental partition proceedings, 1031.....	766

NOTES

—need not be annexed to petition, 175.....	112
But defendant may have oyer, 175.....	112
No jury allowed in suit on—, 494.....	359
Except in certain case, where answer made under oath, 494..	360

NOTICE

PAGE

See the various proceedings under their respective titles, for the notice required by each.

NULLITY OF JUDGMENT

—may be demanded in certain cases, 604.....	472
Even where no appeal taken, or time therefor expired, 604, 611	472, 483
No action for—where remedy is by appeal	472
Direct action necessary, collateral attack not allowed unless—	
apparent on face of record	472
Cases in which collateral attack permitted.....	472, 473
When not permitted	474
Who may sue for—and parties to suit.....	472
Causes for—relate to form or merits of proceeding, 605.....	472
What are vices of form, 606.....	472
—for fraud or other ill practices, etc., 607.....	473
—may be demanded from court of first instance or appellate court, 608	471
When—may be demanded, where case is on appeal, 609.....	482
—must be demanded by petition and citation, 610.....	482
—may be demanded for want of citation, unless defendant present at execution without opposing, 612.....	483
Prescription of action for—on ground of fraud, etc., 613.....	484
Interruption of prescription, etc.....	484
When prescription begins to run, etc.....	485

OATH (OR AFFIDAVIT)

—for arrest of debtor, 214.....	131
—may be made by curator, agent, etc., 215.....	132
Before whom—may be made and terms thereof, 216.....	132
Agent, etc., may make—for all conservatory writs, 217.....	133
—for attachment, 243.....	134
—for sequestration, 276	139
—for provisional seizure, 287.....	142
—for proceedings <i>in rem</i> , 291.....	146
—for injunction, 304.....	156
—of experts, auditors and arbitrators, 448.....	336
—for continuance of cause, 465, 466.....	344, 345

OATH—*Continued.*

	PAGE.
—for jurors, 514.....	370
—for new trial, 561.....	405
When—not necessary for new trial, 562.....	406
—of appraisers and umpire administered by sheriff, 673, 674, 770	536, 600
—of principal or agent to obtain conservatory writs in justice court, 1125, 1126.....	793

OBLIGATION

An—arises at moment of contracting, 14.....	6
but right of action does not, 14.....	6
No right of action to enforce a natural—, 17.....	15
nor illegal or immoral—, 19.....	16
Actions arising from—are transmissible, 22.....	18

OFFENSES (See *Quasi Offenses*)

—give rise to personal actions, 31.....	20
---	----

OFFICERS

When <i>capias</i> will issue against, 730.....	562
---	-----

OFFICERS OF COURT (See JUDGE, COURT, CLERK, SHERIFF, CON-

STABLE)

When—may be punished by judge, 133.....	88
Who are—, 758.....	592
Appointments of—and terms of office, 759.....	593

OFFICIAL BONDS

Jurisdiction of suits on—, 165.....	106
-------------------------------------	-----

OPPOSITION

See the various proceedings, under their respective titles
Where—may be made, as Accounts, Tutors, Successions, etc.

OPPOSITION OF THIRD PERSONS (See INCIDENTAL DEMANDS, INTERVENTION)

	PAGE
Incidental demands in—, 364.....	284
Definition of—and when allowed, 395.....	305
—to claim ownership or assert privilege, 396.....	307
Forum for—, 397.....	309
Proceedings when—is to assert ownership, 398.....	309
—may be accompanied by injunction of sale, 399.....	310
Rights of parties to—where it is not accompanied by injunction, 400.....	310
Sheriff holds proceeds, when—sets up privilege, 401.....	311
Order of payment between—and seizing auditor, 402.....	312
Priority where—based on general mortgage, costs, 403.....	313

ORDER OF APPEAL

See APPEAL No. 1.

ORDER OF COURT (See COURTS, JUDGMENT, JUDGE)

—has effect of judgment, 540.....	326
-----------------------------------	-----

ORDINARY PROCEEDINGS

What are—, 97, 98.....	50
------------------------	----

OWNER (See OPPOSITION OF THIRD PERSONS, *In Rem*)

—of undivided and limited interest may bring petitory action, 45.....	28
—may bring possessory action, 46, 47.....	28
—may assert title by third opposition, 396.....	307

OYER

Acts under private signature, must be produced on prayer for—, 320, 321.....	112
Exception and prayer for—, 320, 321.....	247

PARAPHERNAL PROPERTY

Wife may sue to recover—, 107.....	64
------------------------------------	----

PARENTS

	PAGE.
When—cannot be sued by children, 104.....	62

PARISH COURTS

Jurisdiction of—, 127, 128.....	84, 85
---------------------------------	--------

PARTIES TO SUITS (See DEFENDANT, OPPOSITION OF THIRD PERSONS, INTERVENTION, WARRANTOR, GARNISHEE)

Plaintiff and defendant are—, 99, 100.....	50, 51
Warrantors, intervenors, third opponents are incidental, 101..	51
Garnishees in attachment are—, 246.....	156
how made—, 250, 251, 252.....	164, 165
Garnishees under <i>Fieri Facias</i> are not (<i>Marqueze vs. LeBlanc</i> , 29 A. 194)	
Who may not sue, 102.....	51
What does not disqualify—, 103.....	62
Minors cannot be—against parents, 104.....	62
How heirs are made—, 120.....	76
Making—in Supreme Court, 903.....	712

PARTITION

Where suit for—of immovable instituted, 165.....	105
—must be made judicially, where minor interested, 1020.....	763
likewise where all are majors, and one objects, 1021.....	763
When—is made, 1022.....	763
Right to—, 1023.....	764
Mode of obtaining—, 1024.....	764
Citation of co-heir in—, 1025.....	764
Service of citation in different parishes, 1026.....	764
Decree of—, 1027.....	764
Proceedings before notary, 1028.....	765
Homologation of proceedings, 1029.....	765
Opposition to homologation, 1030.....	766
Supplemental—, 1031.....	766
Confirmation of—, 1032.....	766

PARTNERSHIP

See COMMERCIAL FIRM.

PAYMENT (See TENDER, HEIRS)

	PAGE
—of natural obligation, does not give right of action, 18.....	15
nor of illegal or immoral obligation, 19.....	16
—of mortgage debt by third person, abates hypothecary action, 74	43
Order of between seizing creditor and third opponent, 402, 403	312, 313
—by sheriff of proceeds of judicial sales, 704, 706, 707....	553, 554
Duty of sheriff to make—of funds collected by him as officer, 766, 767	593, 599
—of claims against successions—See Successions.	

PEREMPTORY EXCEPTIONS

Definition of—, 343.....	279
—relating to form of action, must be pleaded <i>in limine</i> , 344..	279
—founded in law, when pleaded, 345, 346.....	271

PERSONAL ACTIONS (See DOMICILE)

Definition of—, 3.....	2
Against whom—lie, 26, 27.....	19
Grounds of—, 28.....	19
—arise from contracts (29), <i>quasi</i> contracts (30), offenses (31), <i>quasi</i> offenses (32).....	26
Divisions of—arising from contracts, 33.....	26
when direct (34), when equitable (35).....	26
Direct—as distinguished from contrary, 36.....	21
when it arises, 37.....	21
When contrary—arises, 38.....	22
—to enforce synallagmatic contract, 39.....	22
—lie against heirs, 40.....	22
—must be brought at domicil of defendant, 162.....	100
When—may be brought elsewhere, 164, 165.....	104, 106

PETITION (See CITATION, CLERK, SHERIFF)

What is a—, 170, 171.....	109
Requisites of—, 172.....	109
Object demanded by—must be stated with certainty, 173....	111
Authentic copies of public acts must be annexed to—, 174.....	111
Acts under private signature need not be annexed to, 175....	112

PETITION—*Continued.*

	PAGE.
but must be produced on demand of defendant, 175.....	112
exception and prayer for <i>oyer</i> , 320, 321.....	247
—and annexed documents must be filed with clerk, 176.....	112
Clerks must indorse day, month and year received, 176....	112
Waiver of service of copy of—, 177.....	113
and clerk shall not charge where service waived, 177.....	113
Copy of—and citation must be served on defendant, 178....	113
one for each defendant, 181.....	116
When one copy of—and citation, will suffice for several de- fendants, 182	117
Clerk sends copy of petition and citation to sheriff, 183.....	117
How service is made where defendants live in other parishes, 184	117
Indorsement and service by sheriff, 185, 186.....	118
—may be required to accompany writ of possession, 631.....	496
For service of petition and citation under the varying conditions— see Citation, Attachment, Absentee, Appeal No. 9.	

PETITORY ACTIONS

Definition of—, 5.....	3
—must be brought against possessor of immovables, 43.....	23
Plaintiff in—must make out title, 44.....	24
—may be brought by owner of whole or part of immovable, 45	26
Bringing of—waives possessory action, 54.....	31
—cannot be cumulated with possessory, exception, 55.....	31
but may follow possessory action, 56.....	32
Consent to cumulate possessory, with—is renunciation of form- er, 57	32

PLEDGE

Property held in—may be provisionally seized, 284.....	199
--	-----

POSSESSION

—as basis for possessory action, 49.....	29
--	----

POSSESSION—WRIT OF

	PAGE
When—will issue and purpose thereof, 630.....	496
Documents which accompany—, 631.....	496
How—is executed, 632.....	497
When defendant will be considered as having complied with—, 633	497
How—is executed where it is for delivery of specific object, 634	497
Procedure where defendant conceals and refuses to deliver it, 635	497

POSSESSORY ACTION

Definition of—, 6.....	3
Who may bring the—, 46.....	27
owner, usufructuary (47), tenants, etc. (48).....	28
Requisites for—, 49.....	29
What plaintiff in—must prove, 53.....	31
—waived by bringing petitory action, 54.....	31
—shall not be cumulated with petitory action, exception, 55... ..	31
—may be followed by petitory action, 56.....	32
Consent to cumulate—with petitory works renunciation of former, 57	32
Judge may order sequestration of property in—, 58.....	32
—is prescribed in one year, 59.....	32
—does not lie for movables, 60.....	32

PREMATURITY OF DEMAND

On exception—works dismissal of suit, 158.....	99
--	----

PRESCRIPTION (See APPEAL, NULLITY OF JUDGMENT, MINOR JUDGMENT, ABSENTEES.)

—of action, governed by <i>lex fori</i> , 13.....	5
—of one year for possessory actions, 59.....	32
—of action by absent defendant against plaintiff in attachment is two years, 267.....	182
—of one year against surety in attachment of absentee's property, 268	183
Plea of—may be made in Supreme Court, 902.....	709

PRINCIPAL DEMANDS

See DEMANDS.)

PAGE.

PRIVILEGES

Conflict of—in what forum adjusted, 126.....	83
Holder of—may enjoin sheriff from paying seizing creditor, 300	224
Injunction and <i>concurso</i> to fix rank of—, 301.....	224
Third opposition to enforce—how made, etc., 396, 401 to 403	307, 311 to 313
Sheriff making judicial sales, must read certificate of— on property, 678	537
and sale is made subject to—, 679.....	538
Purchaser may retain amount to pay—, 683.....	541
No adjudication, where bid not sufficient to pay—, 684....	542
not, however, where—outranked by seizing creditor, 685..	543
Right of privilege creditor, where debt due in installments, 686	543
When seizures under <i>fi fa</i> confer, 722.....	559
and rank in order of levy, 723.....	559
Signature and attachment give no privilege until judgment and seizure, 724	560
but executory process and in proceeding <i>in rem</i> confer same privilege as seizure under <i>fi fa</i> , 725.....	560

PROBATE COURTS

For what—are established, 921.....	722
Why so called, 922.....	724
Who are judges of—, 923.....	724
Powers of—, 924.....	724
Limits of jurisdiction of—, 925.....	726
Procedure of, 926	726
—may make rules, 927, 1040.....	726, 769
Other powers of—, 983.....	746
Citation in—, 1033.....	767
No jury in—, 1036.....	768
—may issue conservatory process, punish for contempt, etc., 1037	768
—may call meetings of creditors of successions, 1038.....	769
Homologation of such proceedings, 1039.....	769

PROBATE COURTS—*Continued.*

	PAGE.
What orders—cannot make, 1041.....	769
Testimony before—to be taken in writing, 1042.....	770
Appeals, new trials, etc., in—as in other courts, 1043.....	770
Pleadings, orders, duties of officers in—as in other courts, 1044 to 1052	771, 772
Payment of privileged claims in—, 1053.....	772
of ordinary claims, 1054.....	772
Proceeding when curator, etc., reports no funds on hand, 1055, 1056	773
When execution will issue, 1057.....	773
When distringas will issue, 1058.....	774
No suspensive appeal from appointment or removal of tutor, 1059	774

PROCEEDINGS (See SUMMARY PROCEEDINGS, SUITS.)

What are ordinary,— 98, 146.....	50, 93
What are executory—, 63, 98, 732.....	37, 50, 562
What are summary—, 98, 146.....	50, 93

PROCEEDINGS *IN REM*

See In Rem.

PROCES VERBAL

What—of probate of will should recite, 942.....	730
---	-----

PROHIBITION—WRIT OF

Courts may issue—, 788 to 790.....	612
—is order forbidding further proceeding in suit, 828.....	623
—issues, when inferior judge exceeds his jurisdiction, 845, 849	643, 650
Is not a writ of right.....	644
When will not issue.....	645 to 647
When will issue	647 to 649
—issues from appellate court in name of state, 846.....	644
Mode of obtaining—, 847.....	649
Affidavit necessary, 848.....	650
Duty and return of judge to whom issued, 850, 851.....	651

PROHIBITION—WRIT OF—*Continued.*

	PAGE.
Disobedience punished as contempt, 852.....	651
Where execution has issued—goes to judge and creditor in execution, 853	651
and creditor in execution, may reply to order, 854.....	652

PROVISIONAL SEIZURE

When—will issue, 284, 285.....	199, 200
Affidavit for—and lessees right to bond, 287.....	202
Intervenor's right to bond.....	207
Plaintiff may bond.....	207
—may issue against property in hands of third person, removed within fifteen days, 288.....	205
—of ships, vessels, etc., 289.....	206
Bonding in such cases, 289.....	206
Defendant or intervenor may bond, 289.....	206, 207
—in proceedings <i>in rem</i> , against thing lost or abandoned, 290.	208
Petition, oath, prayer, etc., order, 291, 292.....	209
Advertisement of notice to appear, 293.....	209
Advertisement for absent owner, 294.....	210
No bond necessary to obtain writ of—, 295.....	210
—in justice of the peace court, 1125.....	793
Who may make affidavit—, agent etc., 1126.....	793
Defendant may bond property, 1127.....	793

PURCHASER AT JUDICIAL SALES

See SALES, EXECUTION, HYPOTHECARY ACTION, EVICTION.

QUASI CONTRACTS

—are grounds for personal actions, 30.....	20
--	----

QUASI OFFENSES

—are grounds for personal actions, 30.....	20
--	----

QUO WARRANTO

—is order to prevent a usurpation, 828.....	623
To whom writ of—may be directed, 867.....	657
When writ will issue, 868.....	657

QUO WARRANTO—Continued.

	PAGE
Who may obtain writ—answer, 869.....	65
Penalty for failure to answer, 870.....	65
Trial is summary, 871.....	65
When writ will not issue, 873.....	65

REAL ACTIONS (See *HYPOTHECARY ACTIONS*)

Definition of—, 4.....	3
Against whom—lie, 41.....	21
—lie against <i>res</i> , 42.....	21
Heirs and executor must be joined in—, 123.....	7
—may be instituted at domicile of defendant or situs of property, 163	16

REAL TENDER

See *TENDER*.

RECEIVERS

Suits against—continue in their name after their discharge, 120	7
---	---

RECONVENTION

—is an incidental demand, 362, 363.....	24
Definition of—, 374.....	25
Where plaintiff resides in parish—must be connected with main action, 375.....	25
if not so connected, must be brought as principal demand at plaintiff's domicile, 376.....	25
and—for any cause, where plaintiff resides elsewhere, 375.....	25
Demand in—may be pleaded in exception or in answer, 377.....	25
or as separate demand and plaintiff cannot except to want of domicil, 377.....	25

RECORD

—which sheriff and clerk must make of judicial sales of real property, 696, 697.....	55
Sheriff must keep—of all sales made on seizures, 699.....	55

RECORD—*Continued.*

	PAGE.
Books of—which clerk must keep, 775.....	607
—of cases, 776.....	607
—of minutes of court, 777.....	608
All records must be indexed, and be open for inspection, 696, 697, 778	550, 609
Clerk of Supreme Court must make—of all judgments and orders, 910	717

RECOVERY

No—of payment of natural obligation, 18.....	15
Nor of immoral or illegal obligation, 19.....	16

RECUSATION

Definition of—, 337.....	263
Causes for—, 338, 339.....	263 to 268
in contested election cases.....	265
Judge cannot decide his own plea for—	265, 269
Service of rule for—	268
Appeal from judgment on—	265
When judge may recuse himself, 340.....	269
—of district judge not reviewable by another.....	266
No collateral attack on capacity of judge <i>ad hoc</i>	267
Who has full power to act, when his acts are valid.....	268
Trial of cases where judge is recused, 341, 342.....	269
must be within nine months after.....	266

REPLICATION OR REJOINDER

To answer—not permitted, averments considered denied, 329..	256
---	-----

RES ADJUDICATA

Judgment of non-suit is not—, 536.....	386
Definitive judgments are such as have force of—, 539.....	388
When judgment of another court has force of—executory process will issue, 746	578
When injunction will issue against judgments, alleged not to have force of—, 748	580
When judgments of justice of peace have force of—, 1133..	796

RESCISSION OF JUDGMENTS

- on demand of absentee, 614.....
- of minor, 615
- must be demanded by petition and citation, 616.....

RETURN DAY OF APPEAL

See APPEAL No. 6.

RETURN OF SERVICE

See CITATION, SHERIFF, CONSTABLE, SERVICE OF CITATION, COMMISSIONS TO TAKE TESTIMONY, *Fieri Facias*, *Habeas Corpus*.

REVENDEICATION

- Demand in—not ground for possessory action, 52.....
- Where actions for—of real property instituted, 163.....
- is an incidental demand, 362, 363.....

REGISTER OF WILLS (of New Orleans)

- Shall make inventories and sales of succession property,
1046

REHEARING IN SUPREME COURT

- granted absentee, where absence unavoidable, 893.....
- When—must be asked for, 911.....
- How—obtained, 912
- Argument for, etc., 913, 914.....

RELATIONSHIP

- within fourth degree, is cause for recusation, 338.....

REM—PROCEEDINGS IN

See *In Rem*.

REMISSION OF DEBT

- Effect of—when made to give jurisdiction, 91.....
- and where one demands less than is due, 156.....

REMOVAL

PAGE.

See the respective titles of the various officers, etc., who may be removed, *e. g.*, TUTORS, EXECUTORS, SHERIFFS, etc.

RENUNCIATION

See HEIR—SUCCESSION.

REPETITION

Action of—to recover what has been paid in error, 18..... 15

RIGHT OF ACTION

When—arises, 14 6
 When—ceases, 16 15
 No—to enforce natural obligation, 17..... 15
 not illegal or unusual obligation, 19..... 16
 —may be used as exception, 20..... 17
 Legatees, vendees, etc., have same—as testator, etc., 23, 24.... 18
 and— lies against them to same extent, 25..... 18
 Plaintiff claiming title has—against mere possessor of immov-
 able, 43 23
 Owner of undivided or limited interest in immovable has—to
 recover, 45 26
 Who has—to retain possession of immovable, 46, 47, . . . 27, 28
 —of wife to recover dotal and paraphernal property, 107.... 64
 Heirs have—against debtor of ancestor, 113..... 68
 Failure to call in warranty, does not destroy—, 388..... 297

RULES

Courts may make—, 145..... 93
 Probate Court may make, 927, 1040..... 726, 769

SAILORS (See CITATION)

Provisional seizure will issue for claims of—, 285..... 200
 against ships, vessels, etc., 289..... 206
 bonding writ in such cases, 289..... 206

SALE—JUDICIAL

	PAGE
— <i>pendente lite</i> of perishable property seized under attachment, 261	17
Sequestered or provisionally seized.	27
Judgment debtor may prevent—by payment of debt, 663.	32
--is made at seat of justice, 664.	32
In the country may be made on plantation, if debtor requires it, 665	32
and notice must be given of it in advertisement, 665.	33
animals and utensils attached to plantation must be sold where seized, 666	33
—advertised three days after notice to debtor, 667.	33
Advertisement need be in English only, 668.	33
But see acts following article and appendix.	
Advertisement must be in official journal, 669.	33
But see acts on p. 532 and appendix.	
Ten days' advertisement for movables, 670.	33
thirty days for steamboats, ships and immovables, 670.	33
Appointment of appraisers and umpire, 671.	33
where parties fail to appoint, sheriff does, 672.	33
oath of appraisers, of umpire, 673, 674.	33
report of appraisers, 675.	33
must be minute, 676.	37
Crying of property at—by sheriff, 677.	37
Mortgage and conveyance certificates must be read at—, 678.	37
—is made subject to privileges and mortgages, 679.	38
and purchaser must pay excess of bid to sheriff, 679.	38
Property at—must bring two-thirds of appraisement, 680.	39
if not must be resold, ten days for movables and fifteen days for immovables, 680.	39
and—is then made on twelve-month credit for what it will bring, 681, 682.	540, 541
Purchaser gives bond for surplus of bid over mortgages, etc., 683	542
and if bid insufficient to discharge mortgages, etc., there is no sale, 684	542
But bid need only suffice to pay privileges superior to that of seizing creditor, 685.	543
—of property where all installments due creditor have not matured. 686	543
Purchaser of a property at—buys subject to real charges, 687.	544

SALE—Continued.

	PAGE.
Judgment creditor and debtor may bid at—, 688.....	545
Where adjudicatee refuses to take property, sheriff sells it again, 689	545
But adjudication must be to another person, 689.....	545
Adjudication at—transfers all rights to property, 690.....	547
Sheriff or successor makes act of sale, 691.....	548
What act must contain, 692, 693, 694.....	548, 549
Want of formalities in act does not invalidate—, 695....	549
Sheriff must record act in mortgage and conveyance office, 696, 697	550
Recorded act makes proof of contents, and certified copy must be received in evidence, 698.....	550
Sheriff must keep record of all—, 699.....	551
Return of sheriff on writ, its duration, and effect of injunction, 700	551
Return of sheriff on writ where sale is made, 701.....	552
Recitals of return, 702.....	552
How sheriff disposes of bond, where—made on credit, 703....	552
If—made for cash, sheriff pays funds to seizing creditor, 704..	552
if on credit, notes must be delivered to creditor, 705.....	553
Where mortgages prime creditor, he receives surplus only, 706	553
Where seizing creditor primes, purchaser pays surplus to mortgagee, 707	554
and where bid leaves no surplus, mortgages subsequent to seizing creditor released, 708.....	554
Mortgages anterior to seizing creditor may be enforced against purchaser by hypothecary action, 709.....	555
When purchaser at—may retain price to meet general mortgages, 710	555
Evicted purchaser at—may recover from execution debtor or creditor, 711	555
Judgment creditor may recover from debtor, amount paid evicted purchaser, 712.....	556
When purchaser—evicted by hypothecary action may recover only from debtor, 713.....	556
but purchaser loses redress unless he gives debtor notice of action, 714	556
When purchaser may demand discussion of debtor's property, 715	556

SALE—Continued.

	PAGE
When property sold on twelve months credit, bond must be delivered to seizing creditor, 716.....	557
Proceedings in—on credit, where there is more than one judgment creditor, 717	557
When property is sold subject to mortgage, purchaser on credit gives bond only for surplus, 718.....	558
If bond not paid at maturity, execution issues against purchaser and surety, 719, 720.....	558, 559
Recitals of <i>fi. fa.</i> in such case, 721.....	559
Privilege of seizing creditor, 722.....	560
—of succession property to pay debts, 990.....	730
Where claims not due, 991, 992.....	733
—on <i>feri facias</i> from justice of the peace, 1143 <i>et seq.</i> ...799 to 801	

SEAMEN

See CITATION, SAILORS.

SEIZURE

See EXECUTION, *Fieri Facias*, JUDGMENT, SALE, WRIT OF POSSESSION, DISTRINGAS.

SEQUESTRATION

—of immovable may be ordered in possessory action, 58....	33
Affidavit for—may be made by agent, 217.....	133
When affidavit for—may be made by agent, 217.....	133
—issues before filing of petition, 237.....	140
Definition of—, 269, 270.....	183, 185
What subject to—, 271, 272.....	185, 186
When judicial—will be ordered, 273.....	186
Court may order—ex-officio, where ownership of property is in dispute, 274	186
Grounds for—, 275	186
Affidavit and bond for, 276.....	186
Amount of bond for—, 277.....	191
Bond for—not required, where defendant has failed, 278.....	191
Bonding—by defendant or plaintiff, 279.....	191
by intervenor	194

SEQUESTRATION—*Continued.*

	PAGE.
Plaintiff may object to insufficiency of surety on release bond,	
279	191
Liability of sheriff in such case, 279.....	191
Terms of release bond, 280, 281.....	197
Sheriff's return and inventory, 282.....	197
his administration, 283.....	198
Perishable property sequestered may be sold <i>pendente lite</i>	827
—in execution of writ of possession, 635.....	497
—gives no privilege until plaintiff has judgment, 724.....	560
—may be ordered by justice of the peace, 1124.....	792
Agent or plaintiff may make affidavit for—before justice,	
1126	793
Defendant may give release bond, 1127.....	793

SERVICE (See CITATION)

—of copy of notarial act annexed to petition, not necessary..	111
Who may waive—of petition and citation, 197.....	113
—of petition and citation, how made.....	118
Personal—how made, 187, 188, 190.....	118, 120
—at domicile, how made, 189, 190.....	118 to 120
—on defendant who is <i>sui juris</i>	190
who is not <i>sui juris</i> , 191.....	120
on married woman divorced or separated from bed and	
board, 193	120
not separated, 193	120
on minor, interdicts or absentees through tutor, 194.....	121
How made when not represented by tutor or curator, 195..	121
on absentee, made on attorney, 196.....	121
on emancipated minor, 193.....	121
on corporation, public or private, 198.....	122
on commercial firms or banks, 199.....	123
on captains or masters of ships, 199.....	123
on garnishees, must be personal, 246.....	157
—of writ of sequestration, 282.....	197
of injunction, 305	232
on notaries in certain cases, 306.....	232
of interrogatories, when necessary, 426, 427.....	326
when not necessary, 428.....	326
Where party is absent, 429.....	329

SERVICE—*Continued.*

PAGE

- of citation of appeal (See Appeal, No. 9).
 of *habeas corpus*, made by and to whom, 803. 615
 of petition and citation by constable, 1078 to 1080. 750

SET OFF

See COMPENSATION.

SHERIFF

See the various writs and proceedings under their respective titles, which the sheriff executes, for his duties, in connection with them, *e. g.*

Absentees, Answer, Appeal No. 9 (citation of appeal) Appraisal, Arrest of Debtor, Attachment.

Bonds.

Capias *ad Satisfaciendum*, Citation, Coroners.

Damages, Distringas, Domicile.

Execution of Judgments, Executory Process, Exemptions from Seizure.

Fieri Facias, Fines of Court, Forthcoming Bond.

Garnishee, Garnishment.

Habeas Corpus, Homesteads.

Injunction, *In Rem*, Interdicts, Intervenor, Inventory.

Judgment.

Keeper.

Officers, Officers of Court, Opposition of Third Persons.

Petition, Possession—Writ of, Privileges, Probate Courts, Prohibition—Writ of, Provisional Seizure.

Quo Warranto.

Record.

Sale—Judicial, Sequestration, Service.

—collects and is responsible for fines imposed by court, 132.. 86

Courts may fine—and deputies for failure, etc., to obey legal orders, 133. 88

—cannot charge for service of citation, where it is waived, 177 113

Service and return of citation by—, 185, 186. 118

How service of citation is made by—, 187 118

personal, 188 118

SHERIFF—*Continued.*

	PAGE.
at domicile, 189.....	118
When defendant <i>sui juris</i> , 190.....	120
When defendant not <i>sui juris</i> , 191.....	120
on married women, 192.....	120
where divorced or separated, 193.....	120
on tutor or curator, 194.....	121
on special tutor, 195.....	121
on agent or attorney in fact, 196.....	121
on emancipated minor, 197.....	121
on corporations, banks, commercial firms, etc., 198.....	122
on captain or master of ship, 199.....	123
Return of—on citation, 200.....	123
where service was at domicile, 201.....	124
where on corporations, banks, etc., 202.....	124
Recitals of return, 203.....	124
—must return original citation to clerk, 204.....	124
Liability of—for failure to serve or make return, 205.....	125
Returns security for arrest to clerk, 225.....	136
creditor has twenty days to except to surety, 226.....	137
delay allowed where surety resides in another parish, 228..	137
rule on—to make him personally liable, 227.....	137
when—liable personally, 229.....	137
Duty of—where surety surrenders debtor, 230 to 234..	137 to 139
—must post citation for absentee defendant, 253, 254.....	165
and keeps petition in such case, 255.....	166
Seizure by—in attachment proceedings, 256.....	167
Possession of—and inventory in such cases, 257.....	167
Duties of—where attachment released on bond, 259.....	191
Return of—and inventory in sequestration, 282.....	197
Administration of sequestered property by—, 283.....	198
—must advertise proceedings <i>in rem</i> , 292, 293.....	208
—returns bond for dissolution of injunction, 309.....	238
When—may recover counsel fees against warrantor, 385.....	296
Duty and liability of—where third opposition not accompanied by injunction, 400	310
—holds proceeds, where third opponent asserts privilege, 401..	311
—may be imprisoned for failure to pay over funds, 730.....	562
Duties of—must execute orders, etc., 760.....	593
Territorial limits of authority, exception, 761.....	594
—may use force to execute orders, 762.....	595

SHERIFF—*Continued.*

	PAGE
When—cannot execute orders and judgments, 763.....	595
nor arrest debtor going to or returning from militia muster, 763	595
—names deputies with approval of court, 764.....	595
—is responsible for constable acting as deputy, 765.....	596
—must promptly pay over funds collected, 766.....	596
remedy and penalty for failure to do so, 767.....	599
—collects fines, etc., 768.....	600
penalty for failure to pay over, 769.....	600
—may swear officers, 770.....	600
Deputies represent—, 771.....	601
When coroner acts for—, 772, 773.....	601
Duties imposed by law on—, 783.....	610
—attends Supreme Court, compensation, 920.....	721
—may be employed by justice of the peace, 1065.....	776
For duties of sheriff not given here, see alphabetical list of titles at head of this title.	

SHIPS

Masters of—how cited, 199.....	123
—may be provisionally seized by material men and seamen, 285	200
while proceeding against master, 289.....	206
bonding of seizure, 289.....	206
Sale of—under <i>ferie facias</i> in thirty days, 670.....	533
Persons residing on—how cited before justice of peace, 1079..	790

SIGNATURE

When—of judge before whom affidavit for arrest was made must be proved, 216.....	132
Denial of—under oath, entitles surety on bail bond to jury trial, 235	139
likewise of attachment bond, 259.....	173
Denial of—in answer, 323.....	245
Effect of denial of—, 325.....	251
Proof of—denied, cuts off other defenses, 326.....	252
Denial of—under oath, entitles defendant in promissory note case, to jury, 494.....	359

GENERAL INDEX.

949

SPECIAL PLEAS OR DEFENSES

See ANSWER.

PAGE.

SPECIFIC OBJECT (See POSSESSION—WRIT OF)

When demanded in petition, must be described with certainty, 173	111
Writ of possession, where delivery of—is decreed, 634.....	497
procedure where defendant conceals and refuses to de- liver—, 635.....	497

STATEMENT OF FACT (See APPEAL No. 7.)

Proceedings to make—, 602.....	470
When court shall make—, 603.....	471
—from justice of peace court, 1120.....	795

STRANGER

In justice court—is one who has no domicile or fixed residence in state, 106	777
---	-----

SUBPOENA DUCES TECUM (See WITNESSES, NOTARIES.)

Courts may issue writs of—, 139.....	90
—lies to produce books, etc., 140, 473.....	91, 348
and when in hands of third party, 141, 473.....	92, 348
How writ of—is complied with, 143.....	92
—will not issue to incriminate party, 475.....	348
Effect of refusal to comply with writ of—, 139, 140.....	90, 91

SUCCESSION (See HEIRS, LEGATEES, CURATORS, ADMINISTRATORS, IN- VENTORY, ACCOUNT, PARTITION, PROBATE COURTS, EXECUTORS.)

—debtors may be sued by heirs, action divisible, 113.....	68
Vacant—sued through curator, 122.....	78
Suits relative to—where instituted, 164.....	104
Where and when—are opened, 929.....	726
Probate of will, 928.....	726
If will is by public act, copy sufficient, 930.....	728
Executor must pray for probate and letters testamentary, 931	728

SUCCESSION—*Continued.*

	PAGE
Death of testator must be shown, 932.....	73
Hearing to prove will, 933.....	73
Proceeding where will is in sealed packet, 934.....	73
Witnesses and heirs must be present at opening, 935.....	73
Order for production of will, 936.....	73
enforcement of order, 937.....	73
Proof of will, 938.....	73
Witnesses, reading, execution, etc., 939 to 943.....	73
Heir may ask for time to deliberate whether he will accept or renounce—, 974.....	72
and during deliberation court orders notary to make inven- tory, 975	72
and names temporary administrator of—, 976.....	72
after ten days, creditors and legatees may compel decision, 977	74
So also where he has not asked for time to deliberate, 979..	74
heir renouncing dismissed with costs, 978.....	74
Heirs not deliberating, and failing to renounce, presumed to accept unconditionally, 980.....	74
but heir may ask for time to deliberate, after being cited. 981	74
If term for deliberation has expired, heir must declare in- tention, 982	75
Claims against—must first be presented to representative of—, 984	75
How representative may approve claim, 985.....	75
Proceeding where approval refused, 986.....	75
All claims against—must be paid concurrently, 987.....	75
Payment how made, 988.....	75
Interest allowed on claims against—, 989.....	75
Sale of property of—to pay debts, 990.....	75
Where claims are not due, 991, 992.....	75
Payment to creditors of—, 993.....	75
When execution issues against tutors and curators, 994, 995..	75

SUITS (See PARTIES TO SUITS, DEFENDANT, OPPOSITION OF THIRD PER-
SONS, GARNISHEES, INTERVENTION)

Actions are termed—, 95.....	9
Definition of—, 96.....	9

SUITS—*Continued.*

	PAGE.
Classification of, 97, 98	
Parties to, 99, 100.....	50, 51
Warrantors etc., as parties to—, 101.....	51

SUMMARY PROCESS (See INJUNCTIONS, EXECUTORY PROCESS, JUDGMENTS)

What is—, 98, 146.....	50, 93
—to be used, where expressly permitted by law, 754.....	584
Opposition to award of arbitrators etc.....	339
to injunction in executory process.....	582
Incidental questions, new trial, 755.....	586
Homologation of experts, etc., reports, 755.....	586
Opposition to syndics account, 755.....	587
Right to—strictly construed	587
May be obtained by rule in certain cases.....	587 to 589
when cannot be had by rule.....	589 to 591
Special days must be fixed for—, 756.....	591
No jury in—except where public office, etc., is involved, 757... ..	591
—lies where clerk refuses to make copies, etc., 780.....	610
Trial of writ of prohibition to be tried summarily, 851... ..	650
—in trial of opposition to appointment as tutor, 954.....	736
—what it means in Probate Court, 1034.....	676

SUPREME COURT (See APPEALS, REHEARING)

Rules of practice in—, 600.....	470
Mandate of—to lower court before execution issues, 620.....	490
—has only appellate jurisdiction, 874.....	650
To what cases jurisdiction of—extends, 875.....	661
Over appointment of tutors, etc., 876.....	685
Implied powers of—, 877.....	685
Orders—may issue, 878	686
Docket of—, 879.....	686
—may be adjourned by one of its judges, etc., 880.....	688
Recusation of judges of—, 881.....	689
Mode of appealing to—, 882.....	689
Proceedings in—on failure to file transcript, 883.....	689

SUPREME COURT—*Continued.*

	PAGE
Rights of appellee, 884.....	691
may file transcript, 885.....	692
may answer appeal, 886.....	692
what may be asked in answer, 887, 888.....	694
appellees failure to pray for amendment, concludes him, 889	695
when answer may be filed, 890.....	695
answer not essential, 891.....	696
Hearing in—in absence of parties, 892.....	696
if absence unavoidable, rehearing granted, 893.....	696
No new evidence received in—, 894, 895.....	697
Result in—where record incomplete, 896.....	699
Assignment of errors, 897.....	700
Certiorari from—to complete record, 898.....	701
mandamus to complete record, 899.....	701
to make statement of facts, 900.....	709
No withdrawal of appeal in—without consent of parties, 901..	709
Original pleas in—prescription, 902.....	709
Making parties in—, 903.....	712
When creditor cannot appeal to—, 904.....	712
—renders judgment, which lower court should have rendered. 905	712
When—will remand, 906	712
Damages in—for frivolous appeal, 907.....	715
Costs of appeal, 908	717
Reasons of judgment in—, 909.....	717
Entry of judgment by clerk of—, 910.....	717
When judgment of—becomes final, 911.....	717
Rehearing, how applied for, 912.....	718
Argument thereon, etc., 913, 914.....	720
Judgments of—to be executed by court of first instance 915..	720
Precedence of judges of, 916.....	720
—may issue orders for documents, etc., 917.....	720
limitation on power, 918.....	721
production of document, 919.....	721
Sheriff attends sittings of—, 920.....	721

SURETIES

PAGE.

See the various proceedings under their respective title
where bond must be given, *e. g.*

Appeal No. 1, 4, Arrest of Debtor, Attachment.

Injunction.

Provisional Seizure, for release of.

Sequestration.

SURRENDER

See ARREST, CESSION.

SUSPENSIVE APPEAL

See APPEAL No. 4

SYNALLAGMATIC CONTRACT

Actions to which—gives rise, 39..... 22

SYNDICS (See APPEAL No. 3, 4, ACCOUNTS.)

Suits against—continue in their own name after discharge,
120 76

Summary trial of opposition to appointment of—, 755..... 586
and appointment may be appealed from, but not suspensively,
580 451

TABEAU OF DISTRIBUTION (See SUCCESSION)

Preparation of—and payment thereunder, 988, 993.....750, 753

TAX, TOLL OR IMPOST

Appeal lies to Supreme Court, where constitutionality of—
contested, 757 660

TENANTS

—may bring possessory action, to protect possession of im-
movable, 48 28

TENDER

When defendant may make real—of property demanded, 404.	404
417	312
—may be made before suit or after issue joined, 404.....	
Distinction between—of money and of thing, 405.....	
Where—must be made, 406.....	
How—must be made, formalities, 407.....	
When notice of—necessary, 408.....	
Manner of making—, 409.....	
of real property or credits, 410, 411.....	316
Proceeding where creditor refuses—etc., 412.....	
deposit in such cases, 413.....	
After—thing at risk of creditor, 414.....	
Costs where—has been made, 415, 416.....	
What rules concerning—are in effect, what repealed, 417.....	
—in cases in justice court, 1094, 1095.....	

TESTAMENT

See SUCCESSION.

TESTAMENTARY EXECUTOR

See EXECUTOR, SUCCESSION, ACCOUNT, LEGATEES.

TESTIMONY

See COMMISSION TO TAKE TESTIMONY, EVIDENCE, APPEAL No. 1
(Statement of Facts).

THIRD OPPOSITION

See OPPOSITION OF THIRD PERSONS.

THIRD PERSONS

See OPPOSITION OF THIRD PERSONS, PARTIES, INTERVENTION, APPEAL
No. 3 (who may appeal).

THIRD POSSESSOR

See HYPOTHECARY ACTION.

TRANSCRIPT OF APPEAL

See APPEAL No. 6.

PAGE.

TRANSLATORS

—are officers of court, 758.....	592
Holds office for one year, 784.....	611
Courts may appoint—oath, etc., 785.....	611

TRAVERSE (See GARNISHMENT, GARNISHEE.

—of answers of garnishee, 264.....	178
------------------------------------	-----

TRESPASSER

—on real estate, may be sued where it is located, 165.....	106
Where corporation is—it may be sued where act committed, 165	106

TRIAL (See NEW TRIAL, CONTINUANCE, JURY, SUMMARY PROCESS.)

—of causes, where judge is recused, 341, 342.....	269
Causes how fixed for—, 463.....	342
Mode of—, 476.....	349
Order of—, 477.....	350
Swearing or affirmation of witnesses at—, 478, 479....	350, 351
Objection to witnesses at—, 480.....	351
bill of exceptions to ruling, 481.....	351
Who are competent witnesses at—, 482.....	351
Manner of pronouncing judgment—, 490.....	357
When summary—allowed, 755.....	580
—of appeal <i>de novo</i> , 586 (parish court).....	458
—of appeal <i>de novo</i> , 1128 <i>et seq.</i> (justice court).....	794 795

TUTORS (See CURATORS, UNDER TUTOR, APPEAL No. 3 (Who may appeal) No. 4, MINORS.

—represent minors in suits, 108.....	65
—act in name of minor, 109.....	66
Actions against minor must be brought against—, 115.....	69
— <i>ad hoc</i> appointed to unrepresented minor, 116, 659.....	70, 738
Suits against—continue in their name, after discharge, 120..	76
Service of citation on—, 194, 195.....	121

TUTORS—*Continued.*

Nomination of—may be appealed from, but not suspensively, 580	51
Who appoints—when parents living, 944.....	51
where parents dead, 945.....	52
Where parents reside in another state, 946.....	52
Duty of all persons to inform judge of necessity for appoint- ment of—, 947	51
of judge receiving information, 948.	51
Father may be named—, 949.....	52
Mother may be named—, 950.....	52
Proceeding where mother re-married, 951.....	52
When ascending relatives may be named—, 952.....	52
When collateral relatives may be named—, 953.....	52
Opposition to appointment of—, 954.....	53
summary trial thereof, 955.....	53
Confirmation of—named in will of parent, 956.....	52
Dative—family meeting to recommend, 957.....	52
Curators <i>ad bona</i> or <i>ad litem</i> forbidden, 958.....	52
Time in which appointee may refuse to serve, 960.....	52
summary trial of refusal, 961.....	52
When—and curators <i>ad hoc</i> are appointed, 964.....	52
When execution will issue against—, 994, 995.....	52
Removal of—, 1013.....	52
who may obtain, 1015, 1019.....	761, 52

UMPIRE

Court appoints—where experts, etc., cannot agree, 446.....	52
Sheriff or auctioneer for judicial sale, acts as—when appraiser cannot agree, 671	52
when appraisers or sheriff may name—, 674.....	52
—to appraise property seized by justice to test jurisdiction. 1089	52

UNDER TUTOR

Represents minor, when his interest opposed to tutor, 117....	52
When appointment of—must be recommended by family meet- ing, 957	52
When—appointed for absent minor, 959.....	52
—may sue for removal of tutor, 1015.....	761

USUFRUCTUARY

	PAGE.
—may bring possessory action, to preserve possession of im- movable, 46, 47.....	27, 28

VACANT SUCCESSIONS

Curator for—how appointed, 966.....	740
Application for curatorship of—must be advertised, 967....	740
in English only and in official journal, 968, 969.....	740
but see acts on page.....	740
opposition must be made in ten days in writing, 970, 971...	741
what grounds will sustain opposition, 972.....	741
summary trial thereof, 973.....	741

VERDICT

See JURY.

VIRILE PORTION

Heir is liable only for—, 120.....	76
------------------------------------	----

VOIR DIRE

See JUROR, JURY.

WAGES

See LABORERS' WAGES.

WAIVER OF SERVICE

Clerk and sheriff cannot charge for copy of petition or citation where—, 177	113
---	-----

WARRANTOR (See WARRANTY.)

—is party to suit, 101.....	51
Where—may be sued, 165.....	105
When delay given to make—party to suit, 380.....	294
term of such delay, 381.....	295
Prayer for judgment against, 382.....	295
Citation of—, 383.....	295

WARRANTOR—*Continued.*

	PAGE
Decree against—extent thereof, 384.....	296
When officer may recover counsel fees from—, 385.....	296
Judgment against—, 386.....	297
—may call others in warranty, 387.....	297

WARRANTY (See WARRANTOR)

Call in—is incidental demand, 363.....	294
Definition of—, 378.....	293
Real and personal—, 379	294
Failure to call in—does not destroy right of action, 388....	297

WASTE

Injunction lies to prevent—, 303.....	295
---------------------------------------	-----

WIFE (See CITATION, SERVICE, HUSBAND, DOMICILE, WOMAN)

—cannot sue husband during marriage, exception 105.....	12
—cannot sue any one without authorization, exception, 106...	62
Husband sues in his own name for wife, exception, 107.....	64
how suit is brought, for separate interest of—, 118.....	74
One petition and citation, where—sued with husband, 182..	117
Service of citation on—not separated or divorced, 192.....	120
when separated or divorced, 193.....	120
When—may enjoin husband from disposing of community property, 298	213
When wife is competent witness for or against husband, 482..	351

WILLS

See SUCCESSIONS.

WITNESS (See TRIAL, COMMISSION TO TAKE TESTIMONY, SUBPOENA
Duces Tecum, CONTINUANCE, EVIDENCE.)

Subpoena and attachment of—, 134.....	89
Payment of—, fees, 134.....	89
Attachment and fine of—refusing to attend, 134.....	90

WITNESS—*Continued.*

	PAGE.
refusing to answer, 136.....	91
liable for damages, 137.....	91
Testimony of—may be taken by commission, 138.....	90, 327
Two—required to inventory in attachments, 257.....	167
two to inventory in sequestration, 282.....	197
two to real tender of money, 407.....	314
of specific object, two, 409.....	316
when property, debt, etc., is to be transferred, two, 411..	317
Testimony of—how taken in writing, 424.....	324
when residing out of parish, 425.....	325
when old, infirm, or about to leave state, 430.....	327
Depositions of—residing in parish, 430.....	327
When—summoned by judge or justice of peace to answer commission, 431	328
—must be sworn and sign testimony, 432, 433.....	328, 330
Testimony of—residing out of state, how taken, 437.....	331
when one apprehends suit will be instituted 440.....	333
—may be heard by auditors, etc., 451.....	338
how punished for refusing to testify, 451.....	338
Absence of—ground for continuance, affidavit, 464, 465..	343, 344
when sickness is not, 467.....	346
Failure to subpœna—not ground for continuance, 469, 470....	346
When absence operates continuance, 466.....	345
When trial may be postponed, until—brought in by attach- ment, 471	347
Fees of—to be taxed as costs, 472.....	347
either party being responsible for fees of six, 472.....	347
Oath or affirmation of—, 478, 479.....	350, 351
—may be objected to, 480	351
exception to ruling thereon, 481.....	351
Who are competent—in civil cases, 482.....	351
—will not be heard after argument, except by consent, 484....	353
—may be summoned to prove will, 935	729
Deposition of—in proof of will, good evidence in future attack, if witnesses dead, 943	731
Testimony of—in Probate Court, must be reduced to writing and annexed to record, 1042	770
—may be summoned to appear before justice, 1053.....	803
may be fined for failure, etc., 1054.....	803
—in justice court may be examined by commission, 1055....	803

WOMEN (See WIFE)

	PAGE
No arrest of married or single—in civil matters, 211, 1115...	129, 739
When—may be compelled to answer interrogations in open court, 349	271

FINIS.

5/15
3/4 4 4





